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J. Vaughan
Middle Temple

R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN
The Court of King's Bench.

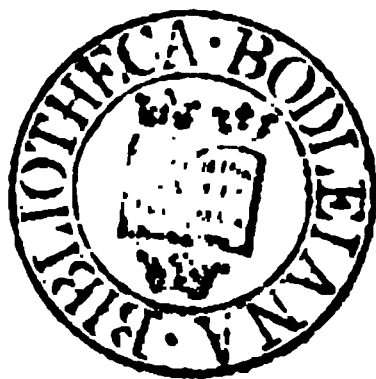
WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.

BY
RICHARD VAUGHAN BARNEWALL, OF LINCOLN'S INN,
AND
JOHN LEYCESTER ADOLPHUS, OF THE INNER TEMPLE,
ESQRS. BARRISTERS AT LAW.

V O L. IV.

Containing the Cases of MICHAELMAS, HILARY, and EASTER Terms,
in the 3d Year of WILLIAM IV. 1832-3.

LONDON:
PRINTED FOR SAUNDERS AND BENNING,
(SUCCESSORS TO J. BUTTERWORTH AND SON.)
43. FLEET-STREET.
1834.



LONDON :
Printed by A. SROTTSWOODZ,
New-Street-Square.

J U D G E S
OF THE
COURT OF KING'S BENCH,

During the Period of these REPORTS.

Sir THOMAS DENMAN, Knt., C. J.

Sir JOSEPH LITTLEDALE, Knt.

Sir JAMES PARKE, Knt.

Sir WILLIAM ELIAS TAUNTON, Knt.

Sir JOHN PATTESON, Knt.

ATTORNEY-GENERAL.

Sir WILLIAM HORNE, Knt.

SOLICITOR-GENERAL.

Sir JOHN CAMPBELL, Knt.

A
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OF THE
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ERRATA.

- Page 124. line 19. for " At common law " read " But for the insolvent act. "
150. line 17. before " another " read " the surrender of. "
169. line 12. read " *Crowder* (with whom were *Praed* and *Fallett*). "
547. lines 6. and 7. read " *Thesiger* and *Wigham*. "
578. line 2. of the marginal note, for " purchasing " read " granting. "
582. last line, for " changing " read " charging. "
611. line 2. for " *Parke* " read " *Part*. "
613. line 14. for " *Parke* " read " *Park*. "
621. line 12. from the bottom, for " *Park* " read " *Parke*. "
683. line 21. for " support of " read " opposition to. "

C A S E S

ARGUED AND DETERMINED

1832.

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Third Year of the Reign of WILLIAM IV.

MEMORANDA.

ON the first day of this term *John Beames, Robert Mounsey Rolfe, and Clement Tudway Swanston, of Lincoln's Inn, Esquires, and Henry Hall Joy, of the Inner Temple, Esquire*, having been, during the preceding vacation, appointed His Majesty's counsel, were called within the bar and took their seats accordingly.

Mr. Serjt. *Spankie* was appointed one of His Majesty's serjeants, and took his seat within the bar accordingly.

On *Sunday* the 4th day of *November*, Lord *Tenterden* C. J. died at his house in *Russell Square*. He was succeeded by Sir *Thomas Denman*, knight, His Majesty's Attorney-General, who was called to the degree of the coif, and gave rings with the motto "*Lex omni-bus una*," and took his seat as Chief Justice of this Court on *Thursday* the 8th day of *November*.

VOL. IV.

B

1832.

GENERAL RULES

AGREED UPON BY THE JUDGES IN PURSUANCE OF
THE STATUTE 2 W. 4. c. 39.

1832 3d 4

It is ORDERED, That every writ of summons, capias, and detainer shall contain the names of all the defendants [if more than one] in the action, and shall not contain the name or names of any defendant or defendants in more actions than one.

It is FURTHER ORDERED, That the following fees shall be taken :

£ s. d.

| | | | | | | |
|--|---|---|---|---|---|---|
| For signing all writs for compelling an appearance, whether of summons, distringas, capias, or detainer, and whether the same shall be the first writ, or an alias or plurics writ : and whether the same shall issue into the same county as the preceding writ, or into a different county | - | - | - | 0 | 2 | 6 |
| For sealing the same | - | - | - | 0 | 0 | 7 |
| For entering an appearance for every defendant | - | - | - | 0 | 1 | 0 |
| Unless an appearance shall be entered for more than one defendant by the same attorney, and in that case for every additional defendant | - | - | - | 0 | 0 | 4 |

It is FURTHER ORDERED, That the person serving a writ of summons shall, within three days at least after such service, indorse on such writ the day of the week and month of such service, otherwise the plaintiff shall not be at liberty to enter an appearance for the defendant according to the statute ; and every affidavit, upon which such an appearance shall be entered, shall mention the day on which such indorsement was made.

It is FURTHER ORDERED, That the sheriff or other officer or person to whom any writ of capias shall be directed, or who shall have the execution and return thereof, shall, within six days at the least after the execution thereof, whether by service or arrest, indorse on such writ the true day of the execution thereof ; and, in default thereof, shall be liable in a summary way to make such compensation for any damage which may result from his neglect, as the Court or a Judge shall direct.

It is FURTHER ORDERED, That the second rule of *Hilary* term 1832 (a) shall be applicable to all writs of summons, distringas, capias, and detainer issued under the authority of the said act, and to the copy of every such writ.

(a) 3 B. & Ad. 390.

IT IS FURTHER ORDERED, That any alias or pluries writ of summons may, if the plaintiff shall think it desirable, be issued into another county, and any alias or pluries writ of capias may be directed to the sheriff of any other county, the plaintiff in such case upon the alias or pluries writ of summons describing the defendant as late of the place of which he was described in the first writ of summons, and upon the alias or pluries writ of capias referring to the preceding writ or writs as directed to the sheriff to whom they were in fact directed.

1832.

7. 11. 32 606
10. 11. 32 1016
2. 11. 32 - 766

IT IS FURTHER ORDERED, That the alias or pluries writ of summons into another county shall be in the following form : —

William the Fourth, &c.

To C. D. of in the county of late of
in the county of [original county]. We command you
as before, [or, often] we have commanded you, &c. [as in the writ of
summons, No. I. in the schedule of the said act].

And that the alias and pluries writ of capias shall be in the following form : —

William the Fourth, &c.

To the sheriff of
We command you, as heretofore we have commanded the sheriff
of that you omit not, &c. [as in the writ of
capias No. 4. in the schedule of the said act].

IT IS FURTHER ORDERED, That in every writ of distringas, issued under the authority of the said act, a non omittas clause may be introduced by the plaintiff, without the payment of any additional fee on that account.

IT IS FURTHER ORDERED, That when the attorney actually suing out any writ shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be indorsed upon the said writ.

IT IS FURTHER ORDERED, That if the plaintiff or his attorney shall omit to insert in or indorse on any writ or copy thereof any of the matters required by the said act to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not, on that account, be held void, but may be set aside as irregular, upon application to be made to the Court out of which the same shall issue, or to any Judge.

IT IS FURTHER ORDERED, That upon all writs of capias, where the defendant shall not be in actual custody, the plaintiff at the expiration of eight days after the execution of the writ, inclusive of the day of such execution, shall be at liberty to declare de bene esse, in case special bail

GENERAL RULES

1832.

2,712 - 11
 2,712 - 11
 3,112 - 11
 2,712 - 11

shall not have been perfected; and if there be several defendants, and one or more of them shall have been served only and not arrested, and the defendant or defendants so served shall not have entered a common appearance, the plaintiff shall be at liberty to enter a common appearance for him or them, and declare against him or them in chief, and de bene esse against the defendant or defendants who shall have been arrested and shall not have perfected special bail.

IT IS FURTHER ORDERED, That in case the time for pleading to any declaration, or for answering any pleading, shall not have expired before the 10th day of *August* in any year, the party called upon to plead, reply, &c. shall have the same number of days for that purpose, after the 24th day of *October*, as if the declaration or preceding pleading had been delivered or filed on the 24th day of *October*; but in such cases it shall not be necessary to have a second rule to plead, reply, &c.

IT IS FURTHER ORDERED, That in case a Judge shall have made an order in vacation for the return of any writ issued by authority of the said act, or any writ of *capias ad satisfaciendum*, *fieri facias*, or *elegit* on any day in vacation, and such order shall have been duly served, but obedience shall not have been paid thereto, and the same shall have been made a rule of Court in the term then next following, it shall not be necessary to serve such rule of Court or make any fresh demand of performance thereon, but an attachment shall issue forthwith for disobedience of such order, whether the thing required by such order shall or shall not have been done in the mean time.

IT IS FURTHER ORDERED, That if any attorney shall, as required by the said act, declare that any writ of summons or writ of *capias* upon which his name is indorsed was not issued by him, or with his authority or privity, all proceedings upon the same shall be stayed until further order.

IT IS FURTHER ORDERED, That every declaration shall in future be entitled in the proper Court, and of the day of the month and year on which it is filed or delivered, and shall commence as follows: —

DECLARATION after summons.

Venue. *A. B.*, by *E. F.* his attorney, [or in his own proper person,] complains of *C. D.* who has been summoned to answer the said *A. B.*, &c.

DECLARATION after arrest, where the party is not in custody.

Venue. *A. B.*, by *E. F.* his attorney, [or in his own proper person,] complains of *C. D.* who has been arrested at the suit of the said *A. B.*, &c.

DECLARATION

1832.

DECLARATION where the party is in custody.

Venue. *A. B.*, by *E. F.* his attorney, [or in his own proper person,] complains of *C. D.* being detained at the suit of the said *A. B.* in the custody of the sheriff [or of the Marshal of the Marshalsea of the Court of King's Bench, or of the Warden of the Fleet.]

DECLARATION after the arrest of one or more defendant or defendants, and where one or more other defendant or defendants shall have been served only and not arrested.

Venue. *A. B.*, by *E. F.* his attorney, [or in his own proper person,] complains of *C. D.* who has been arrested at the suit of the said *A. B.* [or being detained at the suit of the said *A. B.* as before] and of *G. H.*, who has been served with a writ of *capias* to answer the said *A. B.*, &c.

And that the entry of pledges to prosecute at the conclusion of the declaration shall in future be discontinued.

| | |
|---------------|------------------|
| TENTERDEN. | J. PARKE. |
| N. C. TINDAL. | W. BOLLAND. |
| LYNDHURST. | J. B. BOSANQUET. |
| J. BAYLEY. | W. E. TAUNTON. |
| J. A. PARK. | E. H. ALDERSON. |
| J. LITLEDALE. | J. PATTESON. |
| S. GASELER. | J. GURNEY. |
| J. VAUGHAN. | |

It is ORDERED, That the writ of *capias* and *distringas* which shall hereafter be issued out of the superior Courts of law at *Westminster* into the counties palatine of *Lancaster* or *Durham*, shall be directed to the Chancellor of the county palatine of *Lancaster*, or his deputy there, or to the Bishop of *Durham*, or his Chancellor there, and shall be in the following form: —

WRIT OF DISTINGAS.

William the Fourth, &c.

To the Chancellor of our county palatine of *Lancaster*, or his deputy there; or

To the Reverend Father in God by Divine Providence Lord Bishop of *Durham*, or to his Chancellor there, greeting. We command you that by our writ under the seal of our said county palatine to be duly made and directed to the sheriff of our said county palatine, you command the said sheriff [or, if in *Durham*, that by our writ under the seal of your Bishoprick, to be duly made and directed to the sheriff of the county of *Durham*, you cause the said sheriff to be commanded] that he omit not by reason of any

GENERAL RULES

1832.

liberty in his bailiwick, but that he enter the same and distrain upon the goods and chattels of *C. D.* for the sum of forty shillings, in order to compel his appearance in our Court of _____ to answer *A. B.* in a plea of trespass on the case, [or debt, as the case may be,] and how he shall execute that our writ he make known to us in our said Court on the _____ day of _____ now next ensuing.

Witness _____ at *Westminster*, the
day of _____ in the _____ year of our reign.

NOTICE to be subscribed to the foregoing writ.

In the Court of

Between { *A. B.* - - - - Plaintiff,
 and
 { *C. D.* - - - - Defendant.

Mr. *C. D.*

TAKE NOTICE, That I have this day distrained upon your goods and chattels in the sum of forty shillings in consequence of your not having appeared in the said Court to answer to the said *A. B.* according to the exigency of a writ of summons bearing teste on the _____ day of _____, and that in default of your appearance to the present writ within eight days inclusive after the return hereof, the said *A. B.* will cause an appearance to be entered for you, and proceed thereon to judgment and execution, or [if the defendant be subject to outlawry] will cause proceedings to be taken to outlaw you.

WRIT OF CAPIAS.

William the Fourth, &c.

To the Chancellor of our county palatine of *Lancaster*, or his deputy there; or

To the Reverend Father in God _____ by Divine Providence
Lord Bishop of *Durham*, or to his Chancellor there, greeting. We command you, that by our writ under the seal of our said county palatine to be duly made and directed to the sheriff of our said county palatine, you command the said sheriff [or, if in *Durham*, that by our writ under the seal of your Bishoprick to be duly made and directed to the sheriff of the county of *Durham*, you cause the said sheriff to be commanded] that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and take *C. D.* of _____ if he shall be found in his bailiwick, and him safely keep until he shall have given him bail or make deposit with him according to law in an action on promises [or of debt, &c.] at the suit of *A. B.*, or until the said *C. D.* shall by other lawful means be discharged from his custody, and that he further command him, that on execution thereof he do
deliver

deliver a copy thereof to the said *C. D.*, and that the said writ do require the said *C. D.* to take notice, that within eight days after execution thereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of to the said action; and that in default of his so doing, such proceedings may be had and taken as are mentioned in the warning thereunder written or indorsed thereon. And that he further command the said sheriff, that immediately after the execution thereof, he do return that writ to our said Court, together with the manner in which he shall have executed the same, and the day of the execution thereof; or that if the same shall remain unexecuted, then that he do so return the same at the expiration of four calendar months from the date thereof, or sooner if he shall be thereto required, by order of the said Court or by any Judge thereof.

1892.

Witness at *Westminster*, the day of

MEMORANDUM to be subscribed to the writ.

N. B. This writ is to be executed within four calendar months from the date thereof, including the day of such date, and not afterwards.

A WARNING TO THE DEFENDANT.

1. If a defendant being in custody shall be detained on this writ, or if a defendant being arrested thereon shall go to prison for want of bail, the plaintiff may declare against such defendant before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution.
2. If a defendant being arrested on this writ shall have made a deposit of money according to the statute 7 & 8 G. 4. c. 71., and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the defendant, and proceed thereon to judgment and execution.
3. If a defendant having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff, or on the bail bond.
4. If a defendant, having been served only with this writ and not arrested thereon, shall not enter a common appearance within eight days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution.

GENERAL RULES

1832.

liberty in his bailiwick, but that he enter the same and distrain upon the goods and chattels of *C. D.* for the sum of forty shillings, in order to compel his appearance in our Court of _____ to answer *A. B.* in a plea of trespass on the case, [or debt, as the case may be,] and how he shall execute that our writ he make known to us in our said Court on the _____ day of _____ now next ensuing.

Witness _____ at *Westminster*, the
day of _____ in the _____ year of our reign.

NOTICE to be subscribed to the foregoing writ.

In the Court of

Between { *A. B.* - - - - Plaintiff,
 C. D. - - - - Defendant.

Mr. *C. D.*

TAKE NOTICE, That I have this day distrained upon your goods and chattels in the sum of forty shillings in consequence of your not having appeared in the said Court to answer to the said *A. B.* according to the exigency of a writ of summons bearing teste on the _____ day of _____, and that in default of your appearance to the present writ within eight days inclusive after the return hereof, the said *A. B.* will cause an appearance to be entered for you, and proceed thereon to judgment and execution, or [if the defendant be subject to outlawry] will cause proceedings to be taken to outlaw you.

WRIT OF CAPIAS.

William the Fourth, &c.

To the Chancellor of our county palatine of *Lancaster*, or his deputy there; or

To the Reverend Father in God _____ by Divine Providence
Lord Bishop of *Durham*, or to his Chancellor there, greeting. We command you, that by our writ under the seal of our said county palatine to be duly made and directed to the sheriff of our said county palatine, you command the said sheriff [or, if in *Durham*, that by our writ under the seal of your Bishoprick to be duly made and directed to the sheriff of the county of *Durham*, you cause the said sheriff to be commanded] that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and take *C. D.* of _____ if he shall be found in his bailiwick, and him safely keep until he shall have given him bail or make deposit with him according to law in an action on promises [or of debt, &c.] at the suit of *A. B.*, or until the said *C. D.* shall by other lawful means be discharged from his custody, and that he further command him, that on execution thereof he do deliver

deliver a copy thereof to the said *C. D.*, and that the said writ do require the said *C. D.* to take notice, that within eight days after execution thereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of to the said action; and that in default of his so doing, such proceedings may be had and taken as are mentioned in the warning thereunder written or indorsed thereon. And that he further command the said sheriff, that immediately after the execution thereof, he do return that writ to our said Court, together with the manner in which he shall have executed the same, and the day of the execution thereof; or that if the same shall remain unexecuted, then that he do so return the same at the expiration of four calendar months from the date thereof, or sooner if he shall be thereto required, by order of the said Court or by any Judge thereof.

1892.

Witness at *Westminster*, the day of

MEMORANDUM to be subscribed to the writ.

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A WARNING TO THE DEFENDANT.

1. If a defendant being in custody shall be detained on this writ, or if a defendant being arrested thereon shall go to prison for want of bail, the plaintiff may declare against such defendant before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution.
2. If a defendant being arrested on this writ shall have made a deposit of money according to the statute 7 & 8 G. 4. c. 71., and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the defendant, and proceed thereon to judgment and execution.
3. If a defendant having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff, or on the bail bond.
4. If a defendant, having been served only with this writ and not arrested thereon, shall not enter a common appearance within eight days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution.

GENERAL RULES.

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Indorsements to be made on the writ of Capias.**Bail for £****by affidavit,****or****Bail for £****by order of [naming the Judge making
the order], dated the****day of****This writ was issued by E. F. of****, attorney for****the plaintiff [or plaintiffs] within named,****or****This writ was issued in person by the plaintiff within named, [mention
the city, town, or parish, and also the name of the hamlet, street, and
number of the house of the plaintiff's residence, if any such there be.]****N. C. TINDAL.****J. PARKE.****LYNDHURST.****W. BOLLAND.****J. BAYLEY.****J. B. BOSANQUET.****J. A. PARK.****W. E. TACHTON.****J. LITTLEDALE.****E. H. ALDERSON.****S. GASKELL.****J. PATTERSON.****J. VAUGHAN.****J. GURNEY.**

The following rule was agreed upon by the Judges of the Court of King's Bench, in pursuance of the statute 2 W. 4. c. 39. s. 18., and took effect on the first day of *Michaelmas* term 1832.

It is ORDERED, That all writs of *summons*, *distringas*, *capias*, and *detainer* issued in the county of *Middlesex*, shall be issued, signed and sealed, by the signer of the bills of *Middlesex*; and that all such writs issued in any other county, shall be issued and signed by the signer of the writs in the King's Bench office, and sealed by the sealer of the writs until further order.

1832.

The KING *against* JOHN PATTESON. (a)

QUO WARRANTO. The first count of the information charged the defendant with usurping the office of alderman of the city of *Norwich*; the second, the office of justice of peace within the city; and the third count, the offices of alderman and justice of peace. The plea to the first count set out a charter of King *Charles the Second*, whereby he granted, among other things, "that all the aldermen of the city who had borne the office of mayoralty, so long as they should continue in their public offices, should be justices of peace of the same city," and ordained the mode of electing aldermen;

By the statute 12 G. 2. c. 29. s. 6. it is enacted, that the respective high constables shall pay the sums of money received by them in respect of the county rate, to such person whom the justices shall at their quarter sessions appoint to be the treasurer, (which treasurer they are thereby autho-

ried to appoint,) he first giving sufficient security in such sums as shall be approved by the justices at sessions, to be accountable for the money which shall be paid to him in pursuance of that act, and for which, by s. 7., he is made accountable to the justices: Held, that this section of the statute does not make the giving of the security a condition precedent to a person's becoming treasurer, or being responsible or accountable to the justices, but that the appointment is complete without such security being given.

In quo warranto for usurping the office of alderman and justice of peace of the city of *Norwich*, the plea set out a charter of *Car. 2.*, granting, among other things, that all the aldermen of the city who had borne the office of mayor, so long as they should continue in their public offices, should be justices of the peace of the same city; that the defendant was duly elected an alderman, and still was alderman; and that he became mayor, and thereby afterwards became justice. Replication, that the defendant being such alderman and justice, was duly appointed to be treasurer of the county of the city of *N.*, and gave such security to the mayor and recorder, being justices of peace for the said city, as in that behalf required, and accepted and took on himself the office of treasurer, and entered on the discharge of the duty of his office, which offices of alderman and justice, and of treasurer, were incompatible with each other, whereby the defendant vacated the offices of justice and alderman, &c. Rejoinder, that the defendant did not give such security: Held, on demurrer, that the rejoinder was bad, as tendering an immaterial issue:

Held, secondly, that the replication was bad, because the acceptance by a person holding a corporate office, of another incompatible office not corporate, did not operate as an absolute avoidance of the corporate office, though it might be ground of amotion; and that acceptance of an incompatible office does not operate as an absolute avoidance of a former office, in any case where the party could not divest himself of that office by his own act and without the concurrence of another authority to his resignation or amotion, unless such authority be privy and consenting to the second appointment.

Held also, that the defendant, as long as he was an alderman and justice of peace of the city of *N.*, was not a person capable of being appointed county treasurer.

(a) *Littledale J.* sat in the bail-court this term.

and

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against
PATTERSON.

and the plea averred that the defendant was, in *December* 1781, duly elected alderman of the said city, and became and still is alderman thereof. To the second count the defendant pleaded the like charter, his election as alderman, and that in *June* 1788 he was duly elected and was mayor for one year next following and thereby became and was made a justice of peace, &c. There was a similar plea to the third count. Replication to the first plea, that King *Charles* the Second granted, &c., and the defendant was elected alderman as in that plea alleged, but that afterwards in 1788 he was elected and became mayor for one year next following, and thereby was constituted a justice of peace for the said city; and afterwards, in *August* 1827, the defendant, being such alderman and justice as aforesaid, was duly appointed to be treasurer of the county of the city of *Norwich*, giving security to account, &c., and that he gave such security to the then mayor, recorder, &c., being justices of the peace for the said city, as in that behalf required, and then and there took upon himself the office of treasurer, which offices of *alderman and treasurer* were wholly incompatible with each other, whereby the defendant vacated the office of, and ceased to be, an alderman of the said city. To the second plea, that the defendant was elected alderman and mayor, and became justice of peace as in that plea alleged, but that in *August* 1827 he was appointed treasurer, and gave security, and took on himself the office of treasurer, &c. (as before): and that the offices of *justice of the peace and treasurer* were incompatible. To the third plea, the same facts were replied, with an allegation, that the offices of *alderman, justice of the peace and treasurer* were incompatible. Rejoinder to each
part

part of the replication, that the defendant did not give such security to the mayor, &c., being justices of the peace for the said city, &c., as in the replication alleged, and of this, &c. Demurrer, stating for cause that the defendant had attempted to put in issue matter altogether immaterial and not properly issuable, and had not denied, confessed, or avoided the substantial matter in the replication. Joinder in demurrer. This case was argued in *Michaelmas* term 1831.

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Campbell in support of the demurrer. The rejoinder tenders an immaterial issue. It admits that the defendant was elected to, and accepted and took upon himself the office of treasurer; and this renders it immaterial whether or not he gave the security; for by the statute 12 G. 2. c. 29. s. 6., "the high constables are required, at or before the next general quarter sessions after they shall have received any sum of money, to pay the same into the hands of such person whom the justices shall, at their respective general or quarter sessions, appoint to be the treasurer, (which treasurer they are thereby authorized to appoint,) such treasurer first giving sufficient security in such sums as shall be approved by the said justices at their respective quarter sessions, &c." The security to be given is an act to be done after the election to and acceptance of the office.

Then, secondly, the replication is good. It shews an appointment of the defendant to, and acceptance by him, of incompatible offices. It is clear that the offices of alderman and county treasurer are incompatible, for, by the 12 G. 2. c. 29. s. 6., the treasurer is appointed by the justices of the peace, and by s. 7. is accountable to them for the monies he receives, and by s. 11. he is
to

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to continue in office and be removable at their pleasure; and by the 55 G. 3. c. 51. s. 17., the justices are to fix his salary. Then, the two offices being incompatible, the acceptance of the second operates as an avoidance of the first, *Milward v. Thatcher* (a), *Rex v. Tizzard* (b), and *Rex v. Pateman* (c).

This rule is not confined to cases where both the offices are corporate. Wherever the offices are of a public nature, and incompatible, and the public are interested in a due performance of the duties, the acceptance of the second office operates as an avoidance of the first. A coroner, becoming sheriff, vacates the former office. In *Com. Dig.*, tit. *Officer*, K. 5., it is said that a man shall lose his office if he accept another office incompatible, and the first instance put is of an office not in a corporation: "as, if the one office be under the control of the other, as, if the remembrancer of the exchequer be made a baron of the exchequer." Under the same title, B. 6., it is laid down generally, that the grant of an office to one who has another office incompatible is not good; for the first office will thereby be void; as "if a forester by patent for life be made justice in eyre of the same forest *pro hac vice*, the office of forester will be void, for it is incompatible; being subject to correction by the justices in eyre;" or "if the steward, warder, or justice of the forest be made justice in eyre," and 4 *Inst.* 310. is cited; or, "if a justice of C. B. be made a justice of B. R.;" and for this latter position the cases of justices *Dyer* and *Croke* are cited (d). In the first of these, (*Easter*, 4 & 5 P. & M.) *Dyer* himself,

(a) 2 T. R. 81.

(b) 9 B. & C. 418.

(c) 2 T. R. 779

(d) See also *Vin. Abr. Officer and Offices* (R.) and the instance there cited.

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a justice of the Common Pleas, having been appointed a justice of the King's Bench, it was held that the letters patent creating him a justice of K. B. vacated his former patent (a), upon this, among other grounds, that a writ of error lay from C. B. to B. R., and, therefore, that a man might have to reverse his own judgment; and in *Michaelmas 4 Car. 1.* (b), *Croke*, a justice of the Common Pleas, being made a justice of the King's Bench, it was held by all the justices assembled at the Lord Keeper's house, that the office of justice of the Common Pleas became void on signing the patent of promotion, and that no patent of revocation was necessary. And in *Dyer* 159 a. it is said that *Saunders*, then Chief Justice of *England*, who was a justice of C. B. before, never surrendered his former patent, and that it was only determined by operation of law. Yet, even as to judicial offices, two may be held by the same person, if they are not incompatible. Thus *Knivet* was Chancellor and Chief Justice at the same time, in the reign of *Edward III.* (c) So were Lord *Hardwicke* (d) and Lord *Loughborough*, and *Noel* was Chief Justice of *Chester* as well as a judge of *Westminster Hall* (e). So Sir *Edward Littleton* was Lord Keeper and Chief Justice of C. B. at the same time (g), and Sir *Orlando Bridgman* being Chief Justice of C. B. was made Lord Keeper, and still continued Chief Justice (h). These authorities abundantly shew that, as to offices not corporate, the acceptance of a second incompatible with the first, avoids it; and Sir *Charles Howard's* case (i) is a strong authority to the

(a) *Dyer*, 158. b.(c) 5 *Rep.* 8. a.(e) *Dyer*, 158. b. note 35. ed. 1794.(h) 1 *Sid.* 338.(b) *Cro. Car.* 127, 128.(d) *Cas. temp. Hardw.* 364.(g) *Cro. Car.* 600.(i) *Sir W. Jones*, 295.

same

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same effect. There “the Attorney-General desired that, for a general reason, his offices of keeper and bailiff of several walks, and of the game there, and of riding forester, might be *seized*, because all those were subordinate to the office of a verderer (which he held); and, therefore, by that his other offices were determined, and for that he cited *Blage’s* case (a), who was remembrancer in the exchequer, and after that was made one of the barons there; and it was resolved, that his office of remembrancer was gone. Mr. Attorney said he had seen precedents, that divers offices had been seized because one man had so many, quod eis intendere nequit. It was objected by the counsel on the other side that a verderer was by election, and that may be against a man’s will, and, therefore, should not determine other offices by letters patents. To which Mr. Attorney answered, that he had particularly averred that Sir *Charles* had used the office of verderer, and so accepted the election, which he might have waived. The Judges agreed that all the other places here claimed by Sir *C. Howard* were inferior to his place of verderer, and so *determined by acceptance thereof*. Judgment was given upon the whole claim for all things against Sir *Charles Howard*.” The ground of the decision, therefore, was, that the other offices held by Sir *Charles Howard* were actually determined by his acceptance of that of verderer.

It is undoubtedly true, that in many of the cases in which it has been held that a man loses an office when he accepts one that is incompatible, the two offices were corporate, as, in *Milward v. Thatcher* (b), those of jurat

(a) Cited in *Crocker and York v. Dormer*, Poph. 28. and *Colt v. Glover*, 1 Roll. Rep. 452.

(b) 2 T. R. 31.

and

IN THE THIRD YEAR OF WILLIAM IV.

and town clerk, and in *Rex v. Blissel* (a), that of chamberlain and alderman; but the reasons given for those decisions were not that the two offices were corporate, but that they were incompatible. In *Rex v. Tizzard* (b), it was alleged in the replication that the offices of town clerk and alderman were incompatible, and that the defendant by accepting the office of town clerk vacated that of alderman; and on demurrer to the replication, the only question argued was, whether the two offices were inconsistent, it being conceded that if they were, the acceptance of the office of town clerk vacated that of alderman. In *Verrior v. The Mayor of Sandwich* (c), there was a mandamus to restore *Verrior* to the place of town clerk; the return was, that he being town clerk was elected mayor, and that he accepted the office. The question was, whether the same person could be mayor and town clerk. The Court seemed to think he could not, but delivered no opinion; but the argument was not that the two offices were corporate, but that they were incompatible (d); because the mayor was judge of a court of record, which it was the duty of the town clerk to attend ministerially, and he might be fined for his default, and it was not likely that he would impose a fine upon himself. Upon the same ground, it was there said in argument, and affirmed by the Court, that the Chief Justice of C. B. cannot be prothonotary or clerk of the papers in the same court; and it was also said in argument, and affirmed by the Court there, that a bishop could not hold a parsonage by commendam in his own diocese, for he cannot visit himself; and these dicta are adopted, *Com. Dig. Officer*, (B) 6.

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(a) *Doug.* 398. note.

(b) 9 *B. & C.* 418.

(c) *Sid.* 305.

(d) See also *Rex v. Jones*, 1 *B. & Ad.* 677.

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The authorities, therefore, establish that a party holding an office (whether it be corporate or not), by accepting another incompatible with it avoids his first office: and it follows that the defendant in this case, by accepting the office of county treasurer, vacated his offices of alderman and justice of the peace.

Coleridge contra. The issue tendered by the rejoinder was material, because, by 12 G. 2. c. 29. s. 6., the giving of security by the party nominated county treasurer is a condition precedent to the office becoming vested in him. Until security is given, the high constables are not to pay money into the treasurer's hands, nor does the latter become accountable to the justices, nor can they order him to pay any money. Incompatibility is a legal conclusion, the result of facts one or many; and the liability of one officer to account to another is a fact from which incompatibility of offices may result. The replication alleges a fact (the having given security), from which the accountability of the treasurer arises. That is a material fact. The defendant was not bound to admit it, as he must have done if he had not traversed it. It is an established rule in pleading, if there be two or more material facts, a traverse of one is good, *Com. Dig., Pleader*, G. 10. The allegation of acceptance, and entering on the duties, of the office makes no difference; because the defendant has entered on no offices or duties incompatible until he has given the security.

Then, as to the replication, it alleges the incompatibility of the offices, and that by reason thereof, the office of alderman became ipso facto void. It is not disputed that the two offices are incompatible, but it is denied that the appointment of a person holding a corporate

porate

porate office, to an incompatible office not corporate, and his acceptance thereof, will of itself vacate the first. A corporate office has been held to be avoided by acceptance of an incompatible corporate office, on the principle that from the acceptance of the second the law implies a surrender of the first by the officer, and an acceptance of that surrender by the power which appointed him. Where the same power appoints to both offices, the act of appointment to the second implies an assent to the surrender of the first, as the act of acceptance of the second office implies the surrender by the officer of the first. The authorities prove not that the acceptance of the second office of itself vacates the first, but, merely, that two incompatible offices cannot be held together; which is conceded. Thus, the acceptance of the office of sheriff does not ipso facto vacate the office of coroner, though (a) it is a ground of discharge by writ. The coroner is elected by the freeholders in pursuance of a writ from the crown, and he may be discharged of his office by the king's writ sent unto him, and thereupon another writ issues to the sheriff to choose a new coroner; and that writ recites the cause for which the king had removed the other coroner from his office, *Fitzh. N. B.* 163, 164. One of the causes recited in the writ given in *Fitzherbert* is, "that the coroner has been chosen into the office of the sheriff;" from which it appears, that at the time when those writs were framed on which *Fitzherbert* comments, the sheriff was elected by the freeholders. He continued to be so till the statute of *Lincoln*, 9 E. 2. stat. 2. As to the incompatible offices of judges of different courts; in the times of *Dyer* and *Croke* judges were appointed *durante bene placito*, and the king

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(a) *Com. Dig. Officer*, G. 4.

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determined his will as to the first office, by appointing the same party to another incompatible office. This is quite consistent with the opinion delivered by the judges, when *Croke*, who was a justice of C. P., was appointed to the office of Chief Justice of K. B., that a patent of revocation of the first office was unnecessary, because, by making him Chief Justice of K. B., his former patent was in law determined. But where Chief Baron *Walter* was appointed Chief Baron *quam diu se bene gesserit*, though he was in the king's displeasure, and commanded to forbear to execute the office, he continued Chief Baron until the day of his death (a). The king, if he could have deprived him of his office by appointing him to an incompatible office, undoubtedly would. Then, although it appears from the older authorities, not indeed that the acceptance of the second office vacates the first, but that two incompatible offices cannot be held together, the question may still arise, which office becomes vacant? In *Rex v. Blissel* (b), the question was, whether one *Pike* had been duly elected alderman? he, at the time of the election, having been chamberlain of the corporation, and being therefore objected to as ineligible (the aldermen being auditors of the chamberlain's account): but the Court held that he had vacated the office of chamberlain by accepting that of alderman, not on the ground that acceptance of a second incompatible office avoided the first, but that the acceptance of the higher of the two ipso facto vacated the other. The same principle is laid down in *Dyer's* case (c). It was in *Rex v. Trelawncy* (d), where both the offices were corporate, that the doctrine afterwards

(a) *Cro. Car.* 203.(c) *Dyer*, 159 a.(b) *Doug.* 398. note 22.(d) 3 *Burr.* 1615.

adopted

adopted by this Court in *Milward v. Thatcher* (a) was first stated in argument: viz. that if the two were incompatible, it would be the *former* office that was vacated, by acceptance of the latter. In Sir Charles Howard's case (b), the question was not whether the offices were void, but whether they should be seised into the king's hands; the reason of the decision there was, that all the other offices claimed by him were inferior to that of verderer: and, therefore, there was good ground of seizure. As to the dictum that a bishop cannot hold a living by commendam in his own diocese, because the same person cannot be visitor and visited; Gibson in his *Codex*, 913., states that to be a questionable position, because the bishop is under the correction of the metropolitan; and that seems to have been the opinion of Dodderidge J., in *Colt v. Glover* (c). As to the cases of forester, steward, and justice in eyre of the forest, in 4 *Inst.* 310, Lord Coke speaks only of a forester by patent, and *Manwood*, p. 163., says, he is made by letters patent under the great seal, and that some have their offices in fee, some for life, and some only durante bene placito. The steward and justice in eyre are appointed by the king. The dictum as to these offices is, therefore, consistent with the principle that incompatibility, per se, only vacates the first office, where both are granted by the same power. In *Com. Dig.* tit. *Officer*, K. 5. and B. 6., not a single instance of avoidance is mentioned where the grant of the second office is not from the same authority which granted the first, except the case of the bishop holding a parsonage by commendam in his own diocese. According to Gibson, it may be doubted whether that be

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(a) 2 *T. R.* 81.(b) *Sir W. Jones*, 293.(c) *Moore*, 899.

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law; and even if it be, that stands upon its own footing; it is the ecclesiastical law which is positive on this subject, and where the crown pro hac vice is patron of the living, it seems hardly an exception. The ordinary avoidance of a first benefice by taking a second, is by stat. 21 *H. 8. c. 13.*, which applies only to a living of the yearly value of 8*l.* Below that value, the first living is voidable only at the patron's pleasure, unless the bishop by sentence make it void (*a*). Then if no case be found which contradicts the principle, can any analogies be found to support it? The principle is, that the party granting and the grantee must concur to make the avoidance. If the grantor confer a second office, which his grantee of the first declines to accept, the first office is not void; so that the grantee's assent is necessary; *Boston's* case, cited in *Awdley's* case (*b*). There *Boston* was elected to be alderman on purpose to oust him of the office of town-clerk, because they were incompatible offices in one person, and in the King's Bench he had restitution to the first office. If the acceptance of a second office avoided the first simply on account of incompatibility, because thereby the duty of the first could not properly be discharged, one would expect amotion to be necessary, as in all similar cases, such as non-residence, insolvency, &c. In *Rex v. Heaven* (*c*), the defendant was an alderman of *Bedford*, but thirteen years before had removed from *Bedford*, and of late had been appointed to an office which, by act of parliament, required him to reside elsewhere, and it was contended that the office of alderman was thereby vacated, but the Court refused a rule for a quo war-

(*a*) *Gibson's Codex*, 906.(*b*) *Noy's Rep.* 78.(*c*) 2 *T. R.* 772.

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ranto until a sentence of amotion by the corporation. In *Rex v. Pateman* (a), the defendant having accepted an office in the same corporation incompatible with his former one, Lord *Kenyon* said the appointment was an act of the corporation, and equivalent *to an amotion*. Here the defendant has lawfully been elected for life, or until amotion for a reasonable cause, and the corporation have neither expressly nor by implication amoved him. By the charter he might have been elected alderman without having been a candidate, and against his will. He was liable to a penalty if he refused to serve when elected, or withdrew himself from the duties of the office without permission or a reasonable cause. Was he then at liberty, without permission of those who elected him, to vacate the office by the acceptance of a second *conferred by a different authority*? And what reason is there for saying, that if two offices be incompatible, the first should become vacant by appointment to the second, rather than that the appointment to the first should make the person ineligible to the second?

Cur. adv. vult.

PARKE J., in the course of this term, delivered the judgment of the Court (having first stated the pleadings) as follows: — Two questions arose on these pleadings, and were argued at the bar. The first, whether the rejoinder was sufficient? The second, whether the appointment to and acceptance of the office of treasurer of the county of the city did or did not vacate the offices of alderman and justice of the peace, or either of them?

The first question depends upon the materiality of

(a) 2 T. R. 779.

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the averment in each replication, “that the defendant gave such security as therein is before mentioned, to the mayor, recorder, steward and aldermen, being justices of the peace,” the same replication containing also an averment, that “he accepted and took upon himself the office of treasurer, and entered upon the discharge of the duties of his office.” If the giving security be a *condition precedent* to becoming treasurer, or being responsible and accountable as such, the averment is material and traversable. If it be not, it is immaterial, and we are of opinion that by the *form* of the appointment, stated in the replications, it is not made a condition precedent, if it be not so by the statute 12 G. 2. c. 29. s. 6., in pursuance of which statute the appointment took place; and, by the statute, we think it is not made a condition precedent, either to the enjoyment of the office, or to the liability to account for the monies received by virtue of the office. The statute appears to us in this respect to be directory only; and if so, the appointment of the defendant was complete, though such security was not given, and the rejoinders are all bad in law, as tendering issue on an immaterial allegation.

The second question is one of more difficulty and importance. It was admitted on the argument, that the offices of treasurer and of justice of the peace are incompatible: it is also admitted on the pleadings that the defendant was appointed to and accepted the office of county treasurer. The question is, what is the effect of that appointment and acceptance? Without acceptance by the person appointed, it is clear that the first office would not be avoided (*a*). After acceptance, is the first

(*a*) *Noy's Rep.* 78.; *Dyer's Rep.* 332 *b.* in *not.*

office become absolutely void, so that the party may be ousted by a proceeding in quo warranto? If we were to hold that the office of justice of the peace is absolutely void in this case, it would be difficult not to come to the same conclusion in every case in which a justice of the peace accepted an office within his district accountable before justices or at sessions; that, for instance, of overseer of the poor, or churchwarden, or surveyor of the highways, and it would be of mischievous consequence to the interests of the public, if it were to be decided that a magistrate could not discharge the important duties of those subordinate situations without losing entirely and for ever his superior office.

This very question, how far the office of justice of the peace and the office of overseer were compatible, came before the Court in *Rex v. Gayer* (a); the Court gave no judicial opinion on it; but from the form of the proceeding, which was an application to quash an order of sessions discharging an order of two justices appointing the defendant, who was an acting justice of the peace for the county, to be an overseer of the poor, it seems to have been considered both by the bar and by the bench, that if the two offices were incompatible the consequence would be, that the party should be discharged from that of overseer as having been disqualified or exempted, and not from that of justice of the peace as being vacated by the appointment to be overseer.

Again, it would be an anomaly in the law, if a public officer who could not directly resign, or be amoved without the concurrence or privity of a superior authority, should be able to accomplish the same object indirectly by an acceptance of an incompatible office. A

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(a) 1 Burr. 245.

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sheriff, for instance, who is indictable for not accepting and exercising his office, might relieve himself without the concurrence of the crown by being elected to the office of coroner; and other instances of the same kind might be put.

These considerations lead us to doubt whether the general proposition can be supported, that under all circumstances, the acceptance of an incompatible office, by whomsoever the appointment to it is made, absolutely avoids a former office; and upon reference to the authorities, we think that this proposition is not made out; but that it must be limited and qualified; and that such acceptance (though it may be ground of amotion) does not operate as an *absolute avoidance* in those cases where a person cannot divest himself of an office by his own mere act, but requires the concurrence of another authority to his resignation or amotion, unless that authority is privy and consenting to the second appointment.

In the earlier text books and authorities, the ground upon which the acceptance of an incompatible office avoids another is not distinctly explained. In the cases, however, of *Gage v. Peacock* (a) and *Verrior v. The Mayor of Sandwich* (b), it appears to have been argued on the ground of an implied surrender; and in some more modern cases, where the first office is clearly avoided, the reason expressly stated is, that it operates as an implied *surrender* of the former office, or an *amotion* from it. In *Rex v. Trelawney* (c) Lord Mansfield puts it on the former ground; and that opinion is adopted by Buller J. in *Milward v. Thatcher* (d).

(a) *Noy*. 12.(b) 2 *Keb.* 92.(c) 3 *Burr.* 1615.(d) 2 *T. R.* 87.

Lord Kenyon, in *Rex v. Pateman* (a), puts it on the latter. See also the opinion of *Littledale J.* in *Rex v. Hughes* (b). 1832.

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If this view of the subject be correct, it seems to follow that the acceptance of the second office will not absolutely avoid the first, unless it be made by, or with the privity of, that authority which has the power to accept the surrender of the first or to remove from it.

Upon reference to the authorities it will be found that in most, if not in all cases where the office has been held to be *absolutely void*, a surrender to and acceptance by the same persons who appointed to the second office, or an amotion by them, would be good.

A forester by patent for life, or warden of a forest, made justice in eyre of the same forest pro hac vice, 4 *Inst.* 310.; a justice of C. P. made justice of K. B., *Dyer*, 158 b.; a remembrancer of the Exchequer for life made a Baron of the Exchequer, *Dyer*, 197 b.; a flag officer appointed to another command, *Johnstone v. Margetson* (c),—are all instances in which both appointments are made by the crown. The case of a town-clerk made mayor, *Sid.* 305., a jurat made town-clerk, *Milward v. Thatcher* (d), a burgess made alderman, *Rex v. Hughes* (e), all appear to be cases of appointments by the corporation at large. In *Rex v. Tizzard* (g) it does not appear by the pleadings in the case, whether the mayor, alderman, and bailiffs who appointed to the office of town clerk, had or had not the power of accepting the resignation of that of alderman; and as this objection was not stated, we do not

(a) 2 T. R. 777.

(c) 1 H. B. 261.

(e) 5 B. & C. 386.

(b) 5 B. & C. 886.

(d) 2 T. R. 81.

(g) 9 B. & C. 419.

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consider the case as forming an exception to the position now laid down.

The cases of a forester appointed by the crown and elected verderer by the freeholders, *Sir Charles Howard's* case (a), a coroner made a verderer, *Com. Dig., Officer, G. 4.*, only shew that the acceptance of the new appointment is a ground of discharge from the old one by the crown; and that this is so further appears from the argument of *Noy* in *Sir W. Jones*, who said, "that he had seen precedents that divers offices had been seized because one had so many; quod eis intendere nequit." In *Sid. 305.*, where it is said that the Chief Justice *cannot be prothonotary* in his own court, it is not said that by accepting it the office of Chief Justice would be void.

Upon principle, not conflicting with any of the authorities, it seems that an officer cannot avoid his office by accepting another, unless his office be such as he could determine by his own act simply, or unless that authority concurs in the new appointment, which could accept the surrender of, or remove from, the old one.

This defendant is an alderman, and, by virtue of that office, a justice; the office of alderman he could only surrender to the corporation at large, or, by charter or prescription, or by-law, to a select body.

That the assent of the corporation to the resignation of an office is necessary appears from the following authorities: —

In *2 Roll. Abr. 456.* it is said, that an alderman by the *assent* of the corporation can resign and relinquish his office to the corporation, for there is no reason why

(a) *Sir W. Jones, 293.*

he should be bound to execute and continue in his office for all his life, against his will; and the corporation may take such surrender of right without any power given by the charter to take it. In *Rex v. Tidderley* (a) it is laid down that every corporation, as a corporation, has power to take a resignation. In *Taylor's* case (b) the question was, whether an alderman might surrender or not? *Coventry*, solicitor, said he could not, and cited *Medlicott's* case, where the opinion of the Court was, that he could not; but, per *Doderidge*, "perhaps they would not accept his surrender." In *Com. Dig.*, tit. *Franchises*, F. 30., it is said, every member or officer of a corporation may resign his place or office. Nothing is mentioned of acceptance; but as it is followed by these words, "and a corporation has power to take such resignation," it seems to be implied that the corporation must accept it in order to render it valid. *Rex v. The Mayor of Rippon* (c), and *Rex v. Lane* (d), are authorities to the same effect.

If, then, the assent of the corporation at large or a select body be required to make a resignation valid and complete, the defendant could not in this case have effectually got rid of his offices of justice and alderman merely by his own act, and the adoption of it by the other justices and aldermen in sessions assembled; and if so, there can be no implied surrender of those offices by acceptance of an incompatible appointment from them, assembled and acting in the same character.

The offices of justice and alderman, therefore, did not become absolutely void by that acceptance.

(a) *Sid.* 14.

(b) *Popham*, 133., reported, 2 *Roll.* 11., as *Hazard's* case.

(c) 1 *Ld. Raym.* 563.

(d) 2 *Ld. Raym.* 1304.

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It must not, however, be supposed, that in laying this down in the present instance, the Court mean in the slightest degree to trench upon the rule, that where two offices are incompatible they cannot be held together. This is a rule founded on the plainest principles of public policy, and which has obtained from very early times.

It is not perhaps necessary for the Court to decide more, than that the circumstance of the defendant being appointed to, and accepting the office of treasurer, did not vacate that of alderman and justice. But as it may be objected, that if so, the two offices may yet be held together, it may be as well to add, that the acceptance of the treasurership may perhaps be the ground of a motion by the corporate body; and in addition, that it seems to us that the defendant was not a person capable, under 12 G. 2. c. 29. s. 6., as long as he was an alderman and a justice, of being nominated and appointed treasurer. Though there be no direct prohibition in the statute of such an appointment, it is clear that it never contemplated the possibility of the justices appointing one of themselves. By the sixth section they are to appoint a person resident in the county, he first giving sufficient security, and he is to pay the money in his hands according to their orders; and by the seventh section he is to keep books of entries of the sums received and paid by him, and to deliver in accounts, upon oath if required, of such sums, and to lay before the justices at sessions proper vouchers for the same. He is, moreover, by the eleventh section, to be continued in office or to be removed at their pleasure, and to be allowed such sum for his care and pains in the execution of his trust, not exceeding 20*l.* by the year, as they in their discretions shall think

think fit. All these provisions shew that he is intended to be a mere ministerial officer under the justices, and not to be one of their own body. And therefore, if, as we think is the case here, the justices of the county of the city of *Norwich* and Mr. *Patteson* could not, for the reasons above given, by their own acts, the justices by appointing to, and Mr. *Patteson* by accepting, the office of treasurer, vacate his office of alderman and justice, to which under the king's charter he was elected by the citizens duly assembled at a corporate meeting for that purpose, and the offices could not be held together; it follows, as a necessary consequence, that the defendant was not eligible to that office, and, if he still fill it in conjunction with his character of alderman and justice, may by some legal proceeding be amoved, and this conclusion is materially strengthened by the case, before cited, of *Rex v. Gayer (a)*.

For these reasons we are of opinion that the judgment of the Court must be for the defendant.

This judgment must be considered as that of my Brothers *Littledale*, *Taunton*, and myself. My Brother *Patteson* has taken no part in the consideration of the case, for private reasons. Lord *Tenterden*, I believe, entirely concurred in this judgment (*b*).

Judgment for the defendant.

(a) 1 *Burr.* 245.

(b) Lord *Tenterden*, during the argument, stated that, on his being appointed a Judge of this Court, he surrendered the patent creating him a Judge of the Common Pleas.

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82-150 By an act re-
 92-399 citing that a
 102-400 railway between
 112-704 certain points
 would be of
 great public
 utility, and
 would materi-
 ally assist the
 agricultural
 interest and the
 general traffic
 of the country,
 power was
 given to a
 company to
 make such
 railway, accord-
 ing to a plan
 deposited with
 the clerk of the
 peace, from
 which they
 were not to
 deviate more
 than 100 yards.
 By a sub-
 sequent act
 the company,
 or persons
 authorized by
 them, were
 empowered to
 use locomotive
 engines upon
 the railway.

The railway
 was made
 parallel and
 adjacent to an
 ancient high-
 way, and in
 some places

came within five yards of it. It did not appear whether or not the line could have been made, in those instances, to pass at a greater distance. The locomotive engines on the railway frightened the horses of persons using the highway as a carriage road. On indictment against the company for a nuisance:

Held, that this interference with the rights of the public must be taken to have been contemplated and sanctioned by the legislature, since the words of the statute authorizing the use of the engines were unqualified; and the public benefit derived from the railway (whether it would have excused the alleged nuisance at common law or not) shewed at least that there was nothing unreasonable in a clause of an act of parliament giving such unqualified authority.

7 Bac. 451.

INDICTMENT stated that before and at the time, &c. there was a certain king's highway, in the parish of *Stockton-upon-Tees* in the county of *Durham*, leading from *Stockton* to *Yarm*, used by the king's subjects with horses, carriages, &c.; and that during all the time aforesaid there was in the same parish an iron railway and tramroad, leading from the river *Tees* near the south-west end of the town of *Stockton* towards and unto *Wilton Park* colliery, which railway was raised to a great height, to wit five feet, higher than the said highway, and was parallel and adjacent to a part of the same, in the parish, &c., of the length, &c., and breadth, &c., between *Stockton* and *Yarm* aforesaid. And that the defendants on, &c., and on divers other days, &c., set up and placed on the said railway so parallel and adjacent, &c., divers, to wit ten locomotive engines to be worked and propelled by steam along the said railway, together with divers, to wit, &c., furnaces and stoves on each of the said days and times employed in working and propelling the said engines by steam; and did on the said days, &c., use the said engines so worked and propelled by steam, and the said furnaces and stoves respectively so employed in working and propelling the same by steam; and did

on,

on, &c., put, place and burn in the said engines so worked, &c., and in the said furnaces and stoves so employed in working, &c., parallel and adjacent to such part of the said highway, divers large quantities of coke, coal, charcoal, wood, &c., close to the said part of the said highway, and thereby corrupted the air and caused noisome smokes, &c.; and that they did on the said days, &c., attach to each of the said engines a great number, to wit the number of twenty-six, of waggons loaded with coal, and unlawfully caused the said engines so worked by steam, with the said waggons so loaded with coal, attached thereto, to move along the said part of the said railway so raised, &c., and parallel, &c., for a great length of way, to wit one mile, with great noise, force, and violence; and did then and there with the said engines, furnaces and stoves, and the fires burning therein as aforesaid, exhibit terrific and alarming appearances, and make divers loud explosions, shocks and noises, whereby it became dangerous for the subjects of this realm to go, return, pass and repass on, through, over and along the said common highway, near to, parallel and adjacent to the said railway and tramroad; to the great terror, &c., and common nuisance of all the liege subjects then and there going, returning, &c., with their horses, carts and carriages, in, through, and along the said part of the said highway so parallel, &c. There were several other counts, dividing and generalizing the statement. Plea not guilty. The indictment was tried at the *Yorkshire* Lent assizes 1832, by a jury of that county (on a suggestion that an impartial trial could not be had in the county of *Durham*), before *Parke* J., and a special verdict was found.

The verdict described the respective situations of the
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highway and of the railway or tramroad as mentioned in the indictment, adding, that the latter was constructed under and by virtue of the acts of parliament after mentioned, or one of them. It also stated that the railway, which was adjacent and parallel to the highway for more than a mile between *Stockton* and *Yarm*, was separated from it only by a low hedge, except in some places where there were small plantations; and that in many places the two roads were not more than five yards apart. That the defendants (under the authority of the *Stockton and Darlington Railway Company*) did put upon the said railway, so being parallel, &c., six locomotive engines worked by steam, for the purpose of drawing coal-waggons thereon, which engines (under the direction of the defendants) travelled on the said railway, drawing coal-waggons, by night and day, and, when so travelling, emitted great quantities of smoke and steam, and made a great noise, and by their appearance and noise alarmed the horses of many of the king's subjects when travelling along the said highway, and thereby occasioned many accidents, and impeded and annoyed his Majesty's subjects in passing and repassing along the highway with their horses and carriages. But the verdict went on to state, " that the locomotive engines were of the best construction known at the time when they were constructed, and that the said defendants used due care and diligence in the management of them, and from time to time adopted such improvements as had been discovered in the erection and management of locomotive engines worked by steam; and that the said defendants used the said engines as aforesaid for the purpose of facilitating, and did thereby facilitate the transport and carriage of coals and other goods

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goods upon the said railway and tramroad, and that the public obtained coals cheaper and much better by the use of the locomotive engines, but that many coal-waggons are drawn on the railroad by horses." It was further stated that by the statute 1 & 2 G. 4. c. xlv. certain persons were united into a company, and created a corporation, under the name of *The Stockton and Darlington Railway Company*, for the purpose of making and maintaining a railway or tramroad from the river *Tees* at *Stockton* to *Witton Park* colliery, with several branches therefrom, all in the county of *Durham*. And that by another statute, 4 G. 4. c. xxxiii., (which was stated in the title to be made for the purpose of enabling the said company to vary the line of their railway and of some of its branches and to make an additional branch, and of altering and enlarging the powers of the former act,) it was enacted, in sect. 8. — "That it shall and may be lawful for the said company, or any person or persons authorized or permitted by them, from and after the passing of this act, to make and erect such and so many locomotive or moveable engines as the said company shall from time to time think proper and expedient, and to use and employ the same in or upon the said railways or tramroads, or any of them, by the said recited act and this act directed or authorized to be made, for the purpose of facilitating the transport, conveyance, and carriage of goods, merchandize, and other articles and things upon and along the same roads; and also of passengers" (a). The verdict found that some of the defendants were members, and the rest servants, of the company. This case was argued in last *Trinity* term (b).

(a) Locomotive engines were not mentioned in the former act.

(b) Before Lord Tenliden C. J., *Littledale*, *Parke*, and *Taunton* Js.

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Cresswell for the crown. The company were not justified in using the locomotive engines, as they have, to the detriment of the public. The statutes under which they act did not oblige them to come within so short a distance of the highway; for by 1 & 2 G. 4. c. xlv. s. 7. it is enacted, that the company in making their railroads shall not deviate more than 100 yards from the course or direction laid down in the map or plan deposited with the clerk of the peace, and referred to in sect. 6.: they might, therefore, have deviated to an extent not exceeding 100 yards, and by so doing they could have gone far enough from the highway to avoid endangering the public. They must contend, on the other hand, that they have a right to do all that the letter of the statute authorizes, however prejudicial to the public, and although not necessary to their undertaking; for it was not necessary that their railroad should approach, in parts, within five yards of the highway, or be separated from it only by a low hedge. *Plowden*, in commenting upon *Eyston v. Studd* (a), says, "It is not the words of the law, but the internal sense of it, that makes the law; and our law, like all others, consists of two parts, viz. of body and soul; the letter of the law is the body of the law, and the sense and reason of the law is the soul." The restraint, if the act is of a restraining nature (as in *Eyston v. Studd* (b)), or, if it be an enabling act, the power, is not to be extended against common right and reason; but the operation of the statute, if opposed to these, must be controlled by the common law. Thus it is laid down in *Dr. Bonham's case* (c), that if an act of parliament gives the lord of a

(a) *Plowd.* 465. See also *Stowel v. Lord Zouch*, *Plowd.* 363.

(b) *Plowd.* 465.

(c) 8 *Rep.* 118 b.

manor conusance of all pleas within his manor, he shall not have conusance where he himself is party. In *Emanuel v. Constable* (a), where the question was upon the statute 25 G. 2. c. 6. s. 1., which enacts that if any person shall attest *any will or codicil*, to whom any devise, legacy, &c. shall be thereby made, such devise, legacy, &c. shall be void as to him;” the Master of the Rolls, referring to the intention and not the letter of the statute, held that it did not extend to wills of personalty; and the same point was ruled, upon the same principle, in *Brett v. Brett* (b). These last were cases upon a public act: the statutes in question here are, in their nature, private. Such statutes have, in modern cases, been considered as agreements between the adventurers and the public, or a portion of it. Lord Hardwicke says, in *Hornby v. Houlditch* (c), that private acts of parliament, introduced only for the settlement of particular estates, ought to be considered only as common conveyances, and directed by the same rules of law, and therefore cannot be taken to extend as a discharge of any person’s right not mentioned. Now the present statutes provide only for the rights of the adventurers, the land-owners over whose property the railroad passes, and the portion of the public who may use it. By 1 & 2 G. 4. c. xliv. s. 1., it is enacted, that the proprietors shall execute the powers thereby granted, doing as little damage as may be, and making full satisfaction, as after mentioned, to the owners of, and all persons interested in, any lands or hereditaments which shall be taken, used, removed, diverted, or injured, for all damages to be by them sustained in or by the execution of the said powers; and sections 16.

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(a) 3 Russ. 436.

(b) 3 Addams’s Rep. 210.

(c) 1 T. R. 93. note (a).

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and 23. provide for the making of such compensation. If it had been intended that the general rights of the public should be taken away by this act, it may be presumed the legislature would also have provided some compensation for them; but they have none. It cannot be said that the company, having bought the land for the railway, might have used what engines they pleased upon it without an act of parliament. At the time when the first statute passed there were no locomotive engines. Without a special provision by a new act they would have been a nuisance to the public, (who, by the 1 & 2 G. 4. c. xlv. s. 81., were authorized to use the railway with carriages and horses on the conditions there prescribed,) and perhaps also to the proprietors of the adjoining lands and houses. The statute 4 G. 4. c. xxxiii. was therefore necessary to give the company power, as against those land-owners, and that part of the public, to use locomotive engines; it does not follow that the rights of the public in general are concluded by the act. In *Rex v. Sir John Morris (a)*, a local act enabled proprietors of any lands, &c. to make railways through such lands, and *across and along any road or roads* to communicate with the railway of a certain company; and there *Parke J.* observed that, supposing this clause to be taken alone, it must at least be understood with the limitation that, where a railway was laid upon another road, sufficient space must be left, independently of it, for the public to pass. That case shews that where a privilege is bestowed on private adventurers, which may contravene the right of the public, it must (though given in unqualified terms) be exercised under such limitations as not to take away the public right.

(a) 1 B. & Ad. 441.

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F. Pollock, contra. The construction of a statute is like that of any other instrument: the question is, what was meant? and the nature of the statute ought to make no difference, if the meaning be plain. The rule given in *Bac. Abr. Statute*, I. 6., (from *Plowd.* 467.) is to suppose the law-maker present, and to be asked what he intended; and then to give such an answer as he, being an upright and reasonable man, might have been expected to give. The statutes in question here are not analogous to the acts for settling property, which have been compared to private agreements. The enterprise in this case is private; but it is one in which the public are largely interested. Like *Waterloo Bridge*, or the *London Docks*, it has a mixed object; profit to the adventurers, and public benefit. The *London Docks* were established by private funds, but were subsidiary to a material improvement in the collection of the revenue; and a monopoly was therefore given to the company. The principle in such cases is, that some public benefit is to be sacrificed to the greater public benefit derived from the undertaking. What that is in the present case, is shewn by the recital of 1 & 2 G. 4. c. xlv. (a). It has been argued that these acts provide no compensation to the public for the rights alleged to be taken from

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(a) The preamble recites, that the proposed railway and branches from it will be of great public utility, by facilitating the conveyance of coal, iron, lime, corn, and other commodities, from the interior of the county of *Durham* to the town of *Darlington*, and the town and port of *Stockton*, and towards and into the North Riding of the county of *York*; and also the conveyance of merchandize and other commodities from the said town and port of *Stockton* to the said town of *Darlington*, and into the interior of the said county of *Durham*; and will materially assist the agricultural interest, as well as the general traffic of that part of the country, and tend to the improvement of the estates in the vicinity of the said railways.

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them, and therefore that the intention cannot have been to take away those rights. But the claims of the public were undoubtedly taken into consideration when the act passed, and it must have been thought that the general convenience to be expected was compensation enough. Direct compensation is never given to the public by such acts; for instance, in the common clause in turnpike acts, enabling the trustees to take materials from the waste, no indemnity is provided for what is so taken. [Lord *Tenterden* C. J. That is not so in all cases, and it ought not to be in any; for the undertakers of roads are enabled in this way to take property from many individuals without paying.] They and the public are benefited by the road being made at a less expence. There are many acts done on public roads which might be considered nuisances but for the necessity of doing them in the ordinary use of the roads; as stopping to take up and set down goods. Other things which might at a former period have been thought nuisances, become tolerable from the altered habits of society. A new kind of carriage, as an omnibus, may at first alarm horses travelling on the road; but it comes into common use, and they grow accustomed to it. The use of a high road by the different parties interested in it, is a continual balance of conveniences and inconveniences. That a public right may be sacrificed in consideration of a benefit by which the public receive compensation, is a doctrine fully recognized in *Rex v. Russell* (a), though perhaps that case must not be altogether relied upon, as the Lord Chief Justice differed in opinion from the other Judges. [Lord *Tenterden* C. J. It has the

(a) 6 B. & C. 566.

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authority of a decision of this Court.] It may be said here, that the parties receiving benefit from the use of the railroad are not the same with those inconvenienced by the alleged nuisance; but this is too narrow a view of the case: the public at large are to be considered, and they are benefited by the general facilities and advantages given to the commerce of this district. At least there is no improbability in supposing that the legislature took this view of the subject in framing the act. It is suggested that the clause authorizing the employment of these engines was introduced only to prevent the adjoining land-owners, or the persons using the railroad, from treating them as a nuisance; but there are no words in the act to warrant such a limitation. The company have exercised their power so as to cause the least possible inconvenience, by using engines of the best construction. Some inconvenience was to be expected, or the legislative permission would not have been necessary. It is urged that the company are empowered to deviate a hundred yards from the proposed line, and therefore ought to have gone to a greater distance from the highway; but it does not appear that this power was given with a view to the protection of the public, nor does the case shew that at the particular points in question the deviation could have been made. Neither does it appear that the railroad could have been screened from the highway more effectually than it is. The privilege of travelling this railway with locomotive engines is not confined to the company: the public are entitled to do the same. [Lord *Tenterden* C. J. Only with the company's leave. They have a monopoly as to the use of the engines.]

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Cresswell in reply. The doctrine of compensation was certainly carried to a great length, in *Rex v. Russell* (a), by the learned Judge who tried the cause; and *Holroyd J.*, in giving judgment, does not ground his opinion upon that doctrine. To apply it to the present case would, at all events, be carrying it much too far. In the instance referred to, of turnpike acts giving authority to take materials from the waste, the benefit accrues to the public, the loss only to individuals. Here the company acquire a monopoly in the use of the engines with which the road is now travelled, and they claim to do that which is generally injurious to the public.

Cur. adv. vult.

The judgment of the Court was delivered in this term by *Parke J.*, who, after stating the special verdict, proceeded as follows:—

The case turns upon the meaning of the eighth section of the statute 4 G. 4. c. xxxiii. and the question is, whether that section gives an authority to the company to use locomotive engines on the railway absolutely, or only with some implied condition or qualification, that they should employ all practicable means to protect the public against any injury from them? and those means were, on the argument, suggested to be, the altering the course of the railroad, or the erection of fences or screens of sufficient height to exclude the view of the engines from the passengers on the common highway. Now the words of the clause in question clearly give to the company the *unqualified* authority to use the engines; and we are to construe

(a) 6 B. & C. 566.

provisions in acts of parliament according to the ordinary sense of the words, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to, the declared or implied intention of the framer of the law, in which case the grammatical sense of the words may be extended or modified; instances of which are to be found in the case of *Eyston v. Studd* (a), and *Bacon's Abr.* statute letter I., referred to during the course of the argument.

Let us, then, consider whether there is any thing unreasonable, or contrary to the express or implied intention of the legislature, in construing these words in their ordinary sense, and without any such condition or qualification as before mentioned. It is clear that the makers of this, and the prior act, had in view the construction of a railroad (with its branches) in a certain defined line, which (1 & 2 G. 4. c. xlv. s. 6. and 4 G. 4. c. xxxiii. s. 3.) had been delineated on a map, deposited with the clerk of the peace, and from which line the road was not to deviate more than 100 yards, and not into the grounds of persons not mentioned in the book of reference. The legislature, therefore, must be presumed to have known that the railroad would be adjacent for a mile to the public highway, and consequently that travellers upon the highway would be in all probability incommoded by the passage of locomotive engines along the railroad. That being presumed, there is nothing unreasonable or inconsistent in supposing that the legislature intended that the part of the public which should use the highway should sustain some inconvenience for the sake of the greater

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(a) *Plowd.* 463.

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good to be obtained by other parts of the public in the more speedy travelling and conveyance of merchandize along the new railroad. Can any one say that the public interests are unjustly dealt with, when the injury to one line of communication is compensated by the increased benefit of another? So far is such a proceeding from being *unreasonable*, that it was held by the majority of the Judges in *Rex v. Russell* (a), that a nuisance was excusable on that principle at common law; and whether that be the law or not, at least it is clear that an express provision of the legislature, having that effect, cannot be *unreasonable*.

It is true that the same object, that of giving one part of the public the benefit of the use of these engines, might have been effected without the same injury to the other part using the road, if the act had imposed on the company the obligation of erecting a sufficient fence or screen, at their own cost; or had provided that the line of road should be different at that place; but it is by no means necessary to imply such an obligation in order to make the clause reasonable and consistent, for it has been shewn to be so without it; and it is natural to suppose that if such a condition had been intended it would have been particularly expressed.

For these reasons, we think that the defendants were justified under the above-mentioned section of the 4 G. 4., and therefore that the judgment of the Court should be in their favour.

Judgment for the defendants.

(a) 6 B. & C. 566.

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DOE dem. JONES and Others *against* DAVIES.

EJECTMENT for messuages and lands in *Cardigan-shire*. The cause came on for trial at *Cardigan*, at the Lent assizes, 1831; and a special verdict was found, to the following effect: —

Henry Jones, being seised in fee of the premises in question, made his will in 1793, and thereby devised as follows: — “ Having laboured in early life under various difficulties and incumbrances, I felt it my unavoidable duty, by the strictest care and economy, to lighten those burdens as far as was consistent with the necessary expences of life (which some might have attributed to covetousness), because my wife and child would be less able to extricate themselves in case of my death. But now, since it was God’s will to allow me length of days, and to enable me to clear my debts, should my daughter die unmarried, I would not have the small estate I have been at the pains of improving and enlarging so, to be sold or frittered away after her decease, or left to any body who would be

Testator, after 3.7.2.£ - 3
 premising that, should his daughter die unmarried, he would not have his estate sold or frittered away after her decease, or left to any body who would not reside on it, but that it should be entailed, and residence be made the absolute groundwork of such entail; devised all his real estate to trustees and their heirs: “ But to permit, nevertheless, my daughter *S. J.* not only to receive the rents and profits thereof to her own use, or to sell or mort-

gage any part, but also to settle on any husband she may take the same or any part thereof for life, should he survive her, but not without his being liable to impeachment for waste or non-residence, or neglecting necessary repairs. But *should my daughter have a child*, I devise it to the use of *such child*, from and after my daughter’s decease, with a reasonable maintenance for the education, &c. of such child in the mean time. Should none of these cases happen,” he then devised the estate after his daughter’s decease to trustees to preserve contingent remainders for the use of his nephew, on condition of residence, or of giving security for his residence when of age, if he should be a minor when the remainder vested. There were other remainders over. He added, that he did not will to restrain his daughter as a tenant for life, but that in case of misconduct in any of the remainder-men, she might, by the advice or consent of the trustees, set aside such a one by her will. He further added, “ I recommend it to my daughter, for want of issue to herself, not to leave in legacies above 600*l.* and that out of my charge on *N.*, which I have also articulated for, and entail the rest for the further support of this house:”

Held, that the word “ child ” in this devise was *nomen collectivum*; that the daughter took an estate tail; that the estate during her life and after her decease were not of different qualities; and, therefore, that a recovery suffered by her after the testator’s death, was valid.

above 5 *l.* 2*l.* - 2*l.*

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above residing upon it; but that it should be entailed, and the residence of the several remainders in turn be made the absolute groundwork of such entail, imminent business and common or neighbourly visits excepted. I therefore give, devise, and bequeath, unto *William Lewes of Llysnewidd, Thomas Lloyd of Bronwith, and Lewis Gwynne of Monachty, Esquires*, and the survivor of them, and the heirs of such survivor, all my real estate; but to permit, nevertheless, my beloved daughter, *Susanna Maria Jones*, not only to receive the rents and profits thereof to her own use, or to sell or mortgage any part if occasion requires, but also to settle on any husband she may take, the same or any part thereof for life, should he survive her; but not without his being liable to impeachment for waste or non-residence, or neglecting necessary repairs of the house and farm. But should my daughter have a child, I devise it to the use of such child from and after my daughter's decease, with a reasonable maintenance for the education, &c. of such child in the mean time. Should none of these cases happen, I give and devise my said real estate, from and after my said daughter's decease, unto the said *W. L., T. L., and L. G.*, and the survivor of them, and the heirs of such survivor, in trust to preserve contingent remainders for the use of my nephew *John Jones of Carmarthen*, now at *Eton* school, if he shall be at full age at my daughter's decease, and complies with such residence and keeping the houses and farm in good repair, or shall give my trustees security for so doing when he arrives at that age, and supporting a family and servants for the house and farm in the mean time, and to the first and every other son of the said *J. J.*" For default of such residence, he gave the estate to the eldest son of
D. J. Edwards,

D. J. Edwards, on condition of residence and taking the name of *Jones*, and to his first and every other son. There were other like remainders on failure of male heirs, upon the like terms; remainder ultimately to the testator's right heirs for ever. The will then proceeded as follows: — "My will and meaning for having the house and farm occupied is for the sake of improving the neighbourhood as far as my poor abilities extend, which would be otherwise proportionably impoverished, for protecting the parish and supporting its poor. This I am persuaded is my daughter's wish as well as my own, whom I by no means will to restrain as a tenant for life; but in case that either of the remainder-men should ill treat her, or should be likely to turn out an immoral man or a bad member of society, she may, by the advice or consent of the trustees, set aside such an one by her own will and testament (*a*), that my intention of doing good in the neighbourhood might not be defeated. I recommend it to my daughter, for want of issue to herself, not to leave in legacies above five or six hundred pounds, and that out of my charge on *NeVERN*" (a distinct property of the testator), "which I have also articulated for, and entail the rest for the further support of this house." Some charitable and other bequests were added. The daughter was left executrix and residuary legatee.

The testator died in *April* 1794. In the following *September*, *Susanna*, the daughter, suffered a recovery of the premises, after which she married, and she and her husband took the surname of *Jones*. They continued in possession of the premises during their joint lives. *Susanna* outlived her husband, and after his decease

(*a*) It seems uncertain whether the following words were not intended to begin the next sentence.

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devised the premises in question to the defendant, to certain uses. She held them during the remainder of her life, and died in 1830, without having had any issue. A formal entry to avoid fines and recoveries was immediately made by the above-mentioned *John Jones*, who was one of the coheirs at law of *Henry* the testator and of the said *Susanna Maria*, and on whose demise, among others, this ejectment was brought. None of the trustees named in *Henry Jones's* will ever joined in making a tenant to the præcipe for suffering a recovery of the premises in question. This case was argued in *Trinity term (a)*.

E. V. Williams for the lessors of the plaintiff. The principal questions are, whether *Susanna Jones* took, under her father's will, a life estate or an estate tail? and if the latter, whether or not that estate was barred by a valid recovery? On the first point the lessors of the plaintiff say that the word "child" in the will is a word of purchase and not of limitation. *Primâ facie* and in its proper acceptation it is a word of purchase; it is for the defendant to shew that it was meant otherwise. Looking to the whole will, the intention apparently was to put the estate in strict settlement, the daughter taking for life merely. It may be said that an inconvenience arises from construing "child" as signifying only an individual, because, if that child were to die, the estate would then go to its heirs, although the mother might have a child by another husband, which, according to the natural construction of the will, ought to take. It may also be objected, that the first-born child might be a daughter, and would take, according to this

(a) Before Lord Ten/erden C. J., *Littledale*, *Parke*, and *Taunton* Js.

construction, in preference to a son born afterwards; and it may, therefore, be argued that "child" must have been used as nomen collectivum. But it is enough to say that these events may not have occurred to the testator's mind; and, on the other hand, the intention is clear that the daughter should have a life estate only, with remainder to her "child" individually, as purchaser, or perhaps to her children successively as purchasers, if one or more died, as in *Ginger dem. White v. White*(a). The testator here expressly declares his wish that the estate should not be frittered away if his daughter should die unmarried, and that it should be held on the condition of residence; both which objects might be defeated if she took an estate tail. He desires that any husband of his daughter on whom the estate may be settled shall be liable to "impeachment for waste or non-residence;" but if this were an estate tail the husband might become tenant by the curtesy, and then the condition of residence could not be enforced. The reasonable maintenance left for the education of such child applies to an individual child: taking the word as nomen collectivum the bequest would be too indefinite. The care taken to enforce residence in the limitations to remainder-men, and the desire to improve the neighbourhood, are inconsistent with the supposition that he intended the several estates to be defeasible by a common recovery; and on the same supposition it would have been nugatory to give his daughter a specific authority to bar the remainder-men under certain circumstances. He expressly refers to her in this part of the will as "a tenant for life." In the cases where "son" has been construed as nomen collectivum, either there

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(a) *Willcs*, 348.

were

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were other expressions technically applicable to an estate tail, or that construction was evidently borne out by the general intention of the testator. *Robinson v. Robinson* (a) and *Mellish v. Mellish* (b) are instances. The rule, that in construing a will the general intent must prevail in spite of inconsistent particular intentions, goes no further than (as is stated by Lord Redesdale in *Jesson v. Wright* (c)) that “technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise.” But here no technical words are found to contradict the expressed intent that the daughter should take an estate for life only.

It cannot be said that the devise of the estates by *Susanna* was an execution of any power granted to her by *Henry Jones*’s will; and even assuming that it could have been so considered, still, if she was tenant for life only, by suffering a recovery she forfeited both the estate and the power annexed.

But, secondly, assuming that she took an estate for life with remainder to herself in tail, the recovery was not valid, because the two estates were not of the same quality. The life estate was given to trustees to permit *Susanna* not only to receive the rents and profits to her own use, but also to settle on any husband she might take the same or any part thereof for life. This implies a use given to her apart from her husband, which would require the intervention of trustees; so also would the maintenance which is provided for the education of a child during *Susanna*’s life. The legal interest, therefore, during her life, was in the trustees;

(a) 1 Burr. 38.

(b) 2 B. & C. 520.

(c) 2 Bligh, 57.

and

and she, who had only the equitable estate, could not cut off legal remainders by suffering a recovery.

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Wilson contra. It is clear the testator did not intend the property to go over to collaterals, except on failure of issue of his daughter. The words "child," "son," "issue," in wills, have been repeatedly construed, in such cases, as indicating a class; *Bisfield's* case (a), *Milliner v. Robinson* (b), and *Wyld v. Lewis* (c), where Lord *Hardwicke* gives the reason for which that construction has been adopted. In *Robinson v. Robinson* (d), "son" was considered as *nomen collectivum*, and the father held to take an estate in tail male, though the devise to him was for his natural life "and no longer." So in *Mellish v. Mellish* (e), "son" was interpreted as meaning any male descendant, and the reasons given by *Bayley J.* and *Holroyd J.* are applicable here. In *Raggett v. Beaty* (g), "If G. B. die and leave no child lawfully begotten of his body," was held to imply an indefinite failure of issue. In *Broadhurst v. Morris* (h) a devise "to W. B. and his children lawfully begotten for ever, but in default of such issue at his decease to A. B.," was held to give W. B. an estate tail. Then, are the other parts of this will inconsistent with a like construction? The wife is empowered to settle the estate or any part of it on her husband if he should survive her; and it may be said that if she was to take an estate tail it is not likely such a provision would be made, because if the estate were of that nature he might take without any settlement, as tenant by the curtesy. But that would

(a) Cited in *King v. Mellish*, 1 *Ventr.* 231.(b) *Moor.* 682.(c) 1 *Atk.* 433.(d) 1 *Burr.* 38.(e) 2 *B. & C.* 520.(g) 5 *Bingh.* 243.(h) 2 *B. & Ad.* 1.

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be only in case a child had been born, whereas the will gives power to settle on him, at all events; and it obliges the wife to add the condition of residence. It is true, if this was an estate tail, the daughter was enabled to defeat many of the testator's intentions by suffering a recovery; but, as Lord *Tenterden* observed in *Doe dem. Garrod v. Garrod* (a), "the same consequence would happen in many of the cases in which the first taker has been held to have an estate tail, and in some that consequence had actually happened before the decision." It is said the provision of "a reasonable maintenance for the education of such child," shews that an individual child only was meant; but then it must be contended that the devise of the estate after the daughter's decease could attach only to a single child. The testator, however, says, "should my daughter have a child, I devise it to the use of such child;" "should none of these cases happen" (one of which was the daughter's having a child) then I give my said estate to *W. L., &c.* That means, "should my daughter not have a child," which is the same as if he had said "a child or children."

Then, supposing an estate tail to have been devised, it was well barred by the recovery, for the daughter took a legal estate. A devise to *A.* in trust to permit *B.* to receive the rents and profits, gives the legal estate to *B.*, *Broughton v. Langley* (b), *Doe dem. Leicester v. Biggs* (c), *Doe dem. Phillips v. Smith* (d). The Court will not consider the trustees as having taken the legal estate unless the purposes of the will require that they should do so. Unless the trust for the daughter

(a) 2 B. & Ad. 96.
 (c) 2 Tamm. 109.

(b) 2 Ld. Raym. 873.
 (d) 12 Est. 455.

amounts to a trust for her separate use, it does not require that the legal estate should be in the trustees. But it has frequently been held in equity that a mere trust to permit a married woman to receive the rents and profits of an estate or the interest of a fund to her own use does not amount to a trust for her separate use (a). In this case, however, the devise gives also a power to appoint by the advice or consent of the trustees. But there is scarcely any marriage-settlement in which some power is not given, to be exercised with such consent; that does not vest a legal estate in the trustees. It was not necessary for the purposes of this will that they should take such an estate. It cannot be said that the maintenance ordered for education of the child of *Susanna* required a legal estate in the trustees; if so, it might have been necessary that such legal estate should continue beyond her lifetime, and the trustees must have taken a fee, in which case *Susanna's* estate would be an equitable estate tail.

The testator evidently contemplated that in default of issue, his daughter should be enabled to suffer a recovery, or should have a power of appointment. He had a perfect confidence in her; his apprehensions seem to have been from the parties in remainder. He expressly declares that he does not mean to "restrain her as a tenant for life." In case of misconduct in the remainder-men, he recommends to her *for want of issue to herself* not to leave above a certain sum in legacies, (which cannot mean legacies of personalty, because the leaving of those would not depend upon her having or

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(a) See on this point *Jacobs v. Amyntt*, in a note to 1 Madd. 376.; *Jones v. Lockhart*, in a note to Mr. Bell's edit. of Bro. Cha. Ca. vol. iii. p. 383.

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wanting *issue*,) and he advises her to entail the rest for the further support of his house. He must therefore have looked to her suffering a recovery, or exercising a power of appointment to bar the remainder-men, in case they should ill treat her, or prove immoral or bad members of society. Either, then, she took an estate tail, which is barred by the recovery, or she had a power of appointment, which is well executed by her will.

E. V. Williams in reply. As to the first point, in the cases cited for the defendant, there were generally some words of inheritance used by the testator, which constrained the Court to hold that an estate tail passed, notwithstanding the expressed inconsistent intent. As to the second point, the trustees must have taken a legal estate during the lifetime of *Susanna* to enforce the condition of residence, which was a principal object of the testator. [*Parke J.* If so, the same observation would apply to the remainder by virtue of which you claim; for *John Jones* is to take on condition of residence if he shall be of age when the remainder vests in him; or if a minor, he is to give security to the trustees for residing when he shall come of age. *Littledale J.* It was not necessary that the trustees should take a legal estate for the maintenance of *Susanna's* child: they could do all that was requisite as to that by the assistance of the Court of Chancery. It seems to me that the clause recommending to the daughter for want of issue not to leave more than 600*l.* in legacies, refers to the personalty.]

Cur. adv. vult.

PARKE

PARKE J., in this term, delivered the judgment of the Court.

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The questions discussed in this case arise on the will of *Henry Jones*, and the one on which the argument has principally been, is, what estate did the daughter of the testator, *Susanna Maria*, take? It being contended on the part of the lessor of the plaintiff, Mr. *Jones*, that she took only for life, and, consequently, the recovery was bad; and on the other side, for the defendant, that she took an estate in tail.

The will appears to have been drawn by the testator himself, and is one of those unfortunate instances of a person wishing to tie up his estate with limitations and upon contingencies, without knowing what language to use for the purpose. The construction must be according to the plain and manifest intent of the testator, and although there be no words of limitation annexed to the devise in favour of the daughter, yet, if the paramount intent cannot be satisfied without her taking an estate tail, and the language of the will will justify it, such must be the construction; and, upon the best consideration, we are of opinion that she took an estate tail.

First, with respect to the intent, the testator says, "if his daughter should die unmarried," he would not have his small estate, which he had been at the pains of improving and enlarging, sold or frittered away after her decease, or left to any body who would be above residing upon it, but that it should be entailed, &c.

Now, upon this a very strong inference arises, that the issue of the daughter, if she married, were within his view, for he contemplates the possibility of the estate going over to the remainder-man in the event only of

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his daughter dying unmarried; and this is made the foundation of the subsequent devise, for he goes on, "I therefore give, devise, and bequeath unto *W. L.*, &c. all my real estate, but to permit my daughter, not only to receive the rents and profits to her own use, or to sell or mortgage any part if occasion require, but to settle on any husband she may take, the same or any part thereof should he survive her," but on certain conditions. Then he goes on, "But should my daughter have a child, I leave it to the use of such child, from and after my daughter's decease, with a reasonable maintenance for the education of such child in the mean time. Should none of these cases happen, I give and devise my said real estate from and after my said daughter's decease unto the said trustees, and the survivor of them, and the heirs of such survivor, to the use of my nephew *John Jones*," on certain conditions, "and to the first and every other son of the said *John Jones*." Now here the limitation over to the use of *John Jones* is only "if none of these cases should happen," of which the principal was his daughter leaving a child at the time of her death; which is equivalent to saying, if my daughter should die leaving no child; and shews an intent that the estate should only go over on failure of the issue of the daughter. If it were otherwise, if the daughter had had a child, and that child had died in her lifetime leaving issue, the estate would have gone over.

This brings us, secondly, to the consideration, whether the words will warrant the construction of the daughter taking an estate tail. At the time of making the will, and at the testator's death, the daughter was unmarried, and had no child. We think, then, that the word "*child*" was not a *designatio personæ*, but
com-

comprehended a class, and this case is like *Bisfield's*, cited and relied on by Lord *Hale* in *King v. Melling (a)*, "A devise to *A.*, and if he dies not having a son, then to remain to the heirs of the testator. Son was there taken to be used as nomen collectivum, and held an entail:" and other cases to the same effect were cited in the argument.

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Another question was raised in favour of the lessor of the plaintiff, that the recovery was insufficient in consequence of the estates not being of the same quality. But we think that there is no reason for making any distinction of this sort, and that the interest vested in the daughter of the testator was throughout of the same quality.

Being of opinion, therefore, that the daughter was seised of an estate tail, we think that the recovery was good. The postea in consequence must be delivered to the defendant.

Postea to defendant.

(a) 1 *Ventr.* 231

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At a Court Baron C. surrendered copyhold premises to the use of J. H. for life, and after his decease to the use of such person and for such estate as J. H. should by will attested by three witnesses appoint; and in default of such appointment to the use of the heirs and assigns of J. H. for ever.

J. H. was admitted on such surrender, and afterwards by will attested by two witnesses only, devised the premises to W. and J., and died without having made any other surrender or will:

Held, that although the will, attested by only two witnesses, was not a good execution of the power given

to J. H. by the surrender, it operated on the reversion vested in him in default of appointment, and that the want of a surrender to the use of such will was cured by 55 G. 3. c. 192.

EJECTMENT for lands and premises in the county of *Stafford*. The declaration contained two demises in the name of *Thomas Hickman*. Plea, the general issue. The cause came on at the Spring assizes for the county of *Stafford*, 1832, when the jury found a verdict for the lessor of the plaintiff, subject to the opinion of this Court on the following case: —

On the 16th of *July* 1806, at a court baron holden for the manor of *Sedgley* in the county of *Stafford*, *Edward Cox* of *Sedgley*, gentleman, and *Mary* his wife, surrendered into the hands of the lord of the said manor, all that cottage or dwelling-house (therein particularly described) in the occupation of *John Hickman*, together with the use of taking water from a well in the adjoining premises, as then used and enjoyed by the said *John Hickman*, to the use of him *John Hickman*, for and during the term of his natural life; and after his decease to the use of such person or persons, and for such estate and estates, ends, intents and purposes, as the said *John Hickman* should by any other surrender or by his last will and testament in writing, such will to be by him duly executed in the presence of and attested by three or more credible witnesses, surrender, devise, limit,

direct

Sybil. Pow. 221,

direct or appoint; and in default of *such* surrender, &c. to the use of the heirs and assigns of the said *John Hickman* for ever at the will of the lord according to the custom of the said manor. At the same court *John Hickman* was duly admitted upon the said surrender. This ejectment was brought to recover possession of the surrendered premises. *Thomas Hickman*, the lessor of the plaintiff, is the eldest son and heir at law, and heir according to the custom of the said manor of *John Hickman* the surrenderee.

On the 19th of *December* 1806, the said *John Hickman* made his will in writing, in the presence of and attested by two witnesses only, and thereby devised the premises to his wife for her life, and after her death to the defendants *William* and *John Hickman*, subject to certain charges. The testator's wife died in his lifetime. *John Hickman* the testator died on the 17th of *April* 1817, without having made any surrender of the premises, or executed any other will than that before-mentioned. The question for the opinion of the Court was, whether *Thomas Hickman*, the lessor of the plaintiff, was entitled to recover possession of the premises? This case was argued in last *Trinity* term.

R. V. Richards for the lessor of the plaintiff. The lessor of the plaintiff, the heir at law of *John Hickman* the surrenderee, is entitled to recover, because the will under which the defendants claim was not executed in the presence of three witnesses, as required by the terms of the surrender. It may be said, that although the will does not operate as an execution of the power, it may operate on the reversion in fee which in default of appoint-

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appointment was vested in the testator, and that the case is then to be considered as if no surrender whatever had been made, which defect will be supplied by the statute 55 G. 3. c. 192. That statute, however, applies to cases where there has been no surrender whatever to the use of a will, and not to a case where a surrenderee having taken a surrender to the use of a will which he himself has required to be executed in a particular form, afterwards makes a will wanting these formalities. The statute recites that inconvenience has resulted from the necessity of making surrenders, and enacts that where copyhold tenants may, by will, dispose of copyhold tenements, the same having been surrendered to such uses as should be declared by such will, every disposition made by such will of any such copyhold tenements shall be as valid, although no surrender shall have been made to the use of the last will and testament of such person, as it would have been if a surrender had been made to the use of such will. Here there has been a surrender to the use of a will, to be executed in a particular form pointed out in the surrender. Before the statute, it is quite clear that the copyhold land would not have passed except by a will so executed. Section 3. enacts that nothing in that act contained shall be construed "to render valid and effectual any devise or disposition of any copyhold lands, tenements, or hereditaments which would be invalid or ineffectual if a surrender had been made to the use of the last will and testament of the person attempting to dispose of the same." Construing the first and third sections together, it is quite clear that the statute does not apply to a case like the present.

Jervis

Jervis contra. The surrender was to the use of *John Hickman* for life, and after his decease to the use of such person as he should by will executed in the presence of three witnesses appoint; and in default of such surrender or appointment, to himself in fee. There has been no will executed in the presence of three witnesses, and consequently there has been a default of such appointment as is pointed out in the surrender; the fee, therefore, vested in the testator; and the will afterwards made, though it does not operate as a good execution of the power, will operate on the reversion in fee, and the want of a surrender to the uses of that will which was actually executed in this case, will be supplied by the statute.

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Cur. adv. vult.

PARKE J. in the course of this term, delivered the judgment of the Court.

It was admitted in this case, on the part of the defendants, that the will of *John Hickman* was not a good execution of the power given to him by the surrender of the 16th of *July* 1806, in consequence of its not having been executed in the presence of, and attested by, three witnesses; but it was contended, that it might operate on the reversion in fee which was vested in him in default of appointment, and that the want of a surrender to the use of his will was cured by the statute 55 G. 3. c. 192. It is clear that if there had been a surrender previously made by *John Hickman* to the use of his will, the will would have conveyed his interest, notwithstanding it was attested only by two witnesses, for copyholds are neither within the statute of wills nor the statute of frauds. And where a man has both a power and an interest,

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interest, an instrument, if it be sufficient for the purpose, may operate as a conveyance of the interest, although it be defective as an execution of the power. It was argued for the lessor of the plaintiff, that this was not a case within the statute 55 G. 3. c. 192. : but we see no reason for saying so. That statute enacts, that in all cases where, by custom, any copyhold tenant may, by his last will, dispose of or appoint his copyhold tenements, the same having been surrendered to such uses as should be declared by such last will, every disposition made or to be made by any such last will, by any person who shall die after the passing of that act, of any such copyhold tenements, or of any right, title, or interest in or to the same, shall be as valid and effectual to all intents and purposes, although no surrender shall have been made to the use of the last will and testament of such person, as the same would have been if a surrender had been made to the use of such will. Here *John Hickman* died after the passing of that act; and, therefore, the disposition by his will was as valid as if a surrender had been made to the use of it.

We think, therefore, that judgment must be entered for the defendants.

Judgment for the defendants.

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The KING *against* THOMAS ANDREWS ADAMES.

BY a rate for the relief of the poor of the parish of *Pagham* in *Sussex*, allowed *November* 1830, the defendant, who was owner and occupier of lands lying within a district of the parish called *Pagham Level*, was assessed at 1s. 8d. in the pound on the sum of 312l. 14s. 5d. annual value, against which he appealed. The appeal coming on, to be heard at the *April* sessions 1831, was respited; and in the mean time it was referred by the Court to three valuers, to survey and value the parish. At the *July* sessions, 1831, the valuers, having made their valuation, stated that the amount assessed by them upon each occupier of lands within the parish, was the sum which they considered the land would let for, but that they had not made any allowance for monies paid for sewers' rates. The sessions confirmed the valuation, subject to the opinion of this Court, on the question whether or not the sewers' rate paid by the defendant ought to have been deducted from the sum assessed on him? The valuers stated in evidence that the sewers' rate was universally understood to be a landlord's tax; that they had never been called upon to make any deduction from the value of lands in respect thereof; and that they would not have thought of making any special note on the point, had they not been requested on the part of the appellant to do so, in consequence of the pending dispute. The sum assessed on the defendant in this valuation was 306l. 6d. The sewers' rate is paid by those only who are owners

Lands are rate-able to the relief of the poor, in proportion to the net rent which a tenant at rack rent would pay, he discharging all rates, charges, and outgoings: and, therefore, an occupier (whatever be his interest) of land which requires to be protected from floods at an occasional expense defrayed by a sewer's rate, is not rateable to the poor at the same sum as the occupier of lands of similar quality and equal annual produce in the same parish, not liable to the sewer's rate; but he should be rated at that sum, minus the sewer's rate.

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of lands within *Pagham Level*. This case was argued in last *Easter* term (a).

Capron in support of the rate. This being a landlord's tax, the question is whether it ought to be deducted from the sum at which the appellant is rated, he being proprietor as well as occupier? As a matter of convenience, the rent *bonâ fide* paid by a tenant has for many years been adopted as the criterion on which the poor rates are framed. The poor rate is therefore necessarily considered as an occupation rate. The sewers' rate, on the contrary, is admitted to be a burthen on the landlord, depending, like many other charges, on the nature and situation of his estate or his interest therein. Land-tax, ground and quit rents, &c., which are charges on the landlord, are never deducted. [*Parke J.* The effect of the decision of the sessions, is to make land requiring expense to protect it from the sea of the same value as land not requiring that expense.] It is of the same value to the party liable to the poor rate, i. e. the occupier. [*Parke J.* But the real profit derivable from the land is *pro tanto* diminished.] So it is where the land-tax is unredeemed, yet no deduction was ever claimed on that ground. Again, where money is laid out in improvements, as drainage, &c., under which head the sewers' rate may be fairly classed, no allowance is made in respect of it, even for interest on the capital so employed. Neither is the state of the farm buildings ever made the subject of consideration, though, in order to render them available for the beneficial occupation of the property, an extensive outlay may be often necessary, and the landlord has a right to debit the land with

(a) Before Lord Tenterden C. J., *Littledale*, *Parke*, and *Patterson J.*

interest on his capital so expended, as well on that more immediately applied to the cultivation of the farm and the purchase of stock for that purpose. If this be so, why should the sewers' rate be deducted? The profits of the land are equally affected in both cases. There is another view of the subject, with reference to the amount of the landlord's interest. Suppose he holds under an ecclesiastical lease, paying every seventh year a heavy but certain fine for renewal, this fine must constitute a portion of his necessary expenses in respect of the land, yet cannot either annually or in any other mode affect the rate. It might even be contended that annuities payable out of a landlord's estate, interest on mortgages, and other incumbrances of this kind must become the subjects of consideration, if we lose sight of what has always been, in practice at least, the basis of the poor rate; viz., the beneficial occupation. According to the argument which must be maintained on the other side, two adjoining farms of equal productive value, and under precisely similar circumstances, must be differently rated if the owner happens to occupy one and let the other; for it will not be contended that the tenant can claim relief, as he is clearly not aggrieved by the rate. The whole present system of rating must be abandoned, and a new principle adopted in almost every parish.

Long and W. H. Scott contra. Undoubtedly in assessing land to the relief of the poor, rent is in ordinary cases taken to be the criterion of the annual value of the land to an occupier. That is a good general rule, but it is not universal, for suppose land would give a profit just sufficient to pay the expenses of cultivation and no more,

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more, there would then be no rent, but it could not be said that such land should pay nothing. The statute 43 *Eliz. c. 2.* requires the churchwardens and overseers to raise competent sums by the taxation of every occupier of land, according to the ability of the parish. The object undoubtedly was to subject to rate the profit equally which accrues from every species of property in the parish. In practice, personal property has been given up, on account of the difficulty of ascertaining its amount, but as to real property, the principle of equality is preserved. It cannot be said that a farm burdened with a tax by reason of its being necessary to provide against the ravages of the sea, is of equal value with another which is not burdened with that tax. It may be considered in the same light as if part of the land had been swallowed up by the sea. It is difficult to say why rent, which is the landlord's share of the profit of the land, has been made the criterion of the annual value to an occupier. It may be convenient that it should be so, but it is not the true criterion. The tenant's and landlord's profit will vary respectively according to the fertility of the land. If it be a very rich soil, the landlord's share of the profit (the rent) will be greater in proportion to the whole value; if it be very poor land, it will be smaller. [Lord *Tenterden* C. J. Is there any instance of an express deduction in the rent on account of paying sewers' rate or land tax?] There is none known of. [Lord *Tenterden*. Suppose one owner of land in a parish to redeem his land tax and others not. The person who has redeemed the land tax has paid his money; the other has it to pay. Then if the land got into other hands, could the tenant on whose land

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the land tax has not been redeemed, claim to be rated differently?] The subject of rate is the landlord's profit. Whatever diminishes that profit ought also to reduce the rate. The rent here is not the landlord's real share of the profit, because his profit is the rent less the sewers' rate. The net annual profit is the gross profit, deducting thereout the expenses of cultivation, the interest of money laid out in stocking the land, &c. *Rex v. Lord Granville* (a), *Rex v. Lower Mitton* (b), *Rex v. Tomlinson* (c), *Rex v. The Oxford Canal Company* (d), *Rex v. Joddrell* (e). [Lord Tenterden C. J. Suppose the land had been let and the landlord had paid sewers' rates, could the tenant have been relieved?] There is no reason why he should not if he and the landlord had entered into an agreement on this point; but even without an agreement, the sewers' rate would be considered in fixing the rent. The rent, if the land were let and the sewers' rate allowed for in it, would be a fair criterion of the value. [Lord Tenterden C. J. Of the value, to the occupier, but not of the property. *Parke J.* It is immaterial whether the landlord or tenant occupies. The sewers' rate is an outgoing which diminishes the annual profit to whoever pays it.]

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PARKE J. now delivered the judgment of the Court.

The question for the opinion of the Court in this case, is, in effect, whether the occupier of lands in a district of the parish of *Pagham*, which is liable to be flooded, and is protected from floods at a certain occasional expense (for that is the nature of the sewers' rate), ought to be rated at the same sum as the occupier of lands of similar

(a) 9 B. & C. 188.

(b) 9 B. & C. 810.

(c) 9 B. & C. 163.

(d) 10 B. & C. 163.

(e) 1 B. & Ad. 403.

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quality and of equal annual produce, lying in the same parish, but not liable to the same expense.

We are of opinion that he ought not. It is obvious that the average annual net profit of one description of land is not the same as that of the other; and, both upon principle and authority, we think the rate ought to be made in proportion to that profit. The statute 43 *Eliz. c. 2.* requires the churchwardens and overseers to raise competent sums, by the taxation of every occupier of lands, according to the ability of the parish: nothing is expressly said as to the principle upon which the rate should be made, but it is implied that it must be made with equality, and with some reference to the subject of occupation.

Now it is quite clear it ought not to be made according to the profit derived by the occupier himself; for if that were so, the rate must vary according to the nature of the occupier's interest. An occupier who is tenant at will at rack-rent, and therefore receives a less share of the annual profit of the land than one who is tenant for years at a small rent, and still less than one who is a tenant in fee simple, and pays none at all, would be rateable at a less sum; a proposition which was never yet contended for.

Again, it is quite clear, that though the occupier is the person who nominally pays the tax, it is in reality paid by the beneficial owner, and is a charge upon the land. In proportion as the average tax which the tenant has to pay, is greater, in the same proportion will he give less rent to the owner. Ultimately, in the long run, this will always be the case; though when the tenancy is for a term more or less long, the burthen upon the landlord is postponed for a greater or less period. This being so, it follows that, in order to make an equal rate, the
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nature of the occupier's interest must be disregarded, and the rate imposed according to some value of the subject of occupation. Usage and convenience have established this value to be not that of the estate or property itself, but that of the profit which is or might be made from the estate or property; and as it would be very difficult and extremely troublesome to ascertain the precise value of that profit during the time for which each rate is made, and in case of occasional profit both troublesome and unjust, (*Rex v. Mirfield (a)*, *Rex v. Hull Dock Company (b)*), to make a rate for a large sum at one time and a small one or none at another, upon the same land, the rule has been to assess according to the annual profit of the land; or, where the produce is not matured in one year, then upon an average of years, from which profit deductions are allowed for all the expenses necessary to its production. It is not material whether the whole or a certain aliquot part of that net profit be rated, provided all lands of the same description are rated equally upon that aliquot proportion of the profit; and in practice it is usual, and it is most convenient, to rate lands at the rack-rent which they would pay to a landlord, or some certain portion of it, the tenant paying all rates, charges and outgoings; which is in effect rating according to a part of the net profit only; but provided it be the same aliquot part in all cases, it makes no difference.

Further, if the subject of occupation be of a perishable nature, or require an annual expense to secure its existence, an allowance ought to be made on this account; for the total annual profit is not the net annual profit; a part must be set aside for the restoration and main-

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(a) 10 East, 219.

(b) 5 M. & S. 394.

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 The King
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tenance of the subject of occupation. It is on this principle that buildings have been permitted to be rated at less in proportion than arable and other land. The cases, especially those of a more recent date, in which the principle of rating has been more fully discussed and considered, will be found to have established this rule of rating, which is, in other words, that all lands are to be assessed in proportion to the net rent which a tenant at rack-rent would pay, he discharging all rates, charges and outgoings.

It may be sufficient to refer to the following authorities in support of this position. *Rex v. The Birmingham Gas Light and Coke Company (a)*, *Rex v. Hull Dock Company (b)*, *Rex v. Attwood (c)*, *Rex v. Trustees of the Duke of Bridgewater (d)*, *Rex v. Tomlinson (e)*, *Rex v. Lower Mitton (g)*, *Rex v. The Oxford Canal Company (h)*, *Rex v. Joddrell (i)*. It remains only to apply the principle to the present case, and there can be no difficulty in saying, that land which requires some occasional expenditure to preserve it from being damaged by water, and to make it as productive as it is, would let for less rent than similar land which requires none, the tenant defraying amongst others that occasional expenditure. In other words, the net average annual profit of both is not the same, and consequently the rate ought not to be the same.

In the course of the argument a question was asked, whether land of which the land-tax was redeemed ought to be rated higher than land of the same quality, which is still chargeable with the tax. The answer is, that it ought not: the annual net profit of both is the

(a) 1 B. & C. 506.

(c) 6 B. & C. 277.

(e) 9 B. & C. 163.

(h) 10 B. & C. 163.

(b) 3 B. & C. 516.

(d) 9 B. & C. 68.

(g) 9 B. & C. 810.

(i) 1 B. & Ad. 403.

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same, though such annual profit in the latter case is liable to a tax from which it is by law exempted in the former. The rate in the present case must therefore be amended.

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I must add that this is the judgment of myself and my brothers *Littledale* and *Patteson*, who heard the argument. Lord *Tenterden* was of a different opinion.

TAUNTON J. then said that he concurred in the judgment delivered.

The Company of Proprietors of the WITHAM
Navigation *against* PADLEY and Others.

Friday,
Nov. 2d.

TRESPASS for breaking and entering the plaintiff's close, and pulling down a watch-house. Plea, general issue. At the trial before *Park J.*, at the *Lincoln* Summer assizes 1832, the pulling down the watch-house was admitted; and the defence was that it was placed on the highway, and that the defendants, as surveyors of the highways, (after notice) pulled it down, being a public nuisance and obstruction. The learned Judge was of opinion that though the locus in quo was a highway, and the watchhouse erected thereon a nuisance, the defendants could not justify the pulling of it down under the general issue; and he directed the jury to find a verdict for the plaintiff.

In trespass against surveyors of the highways for pulling down a watch-house, the act 13 G. 3. c. 78. s. 82. does not enable them under a plea not guilty, to justify the removing it as being a nuisance on the highway.

y Buc. 704.

Amos now moved for a new trial, on the ground of misdirection. The 13 G. 3. c. 78. s. 82. enacts, that "if any action shall be commenced against any person for any

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thing done in pursuance of that act, the defendant may plead the general issue, and give the act and the special matter in evidence, and that the same was done in pursuance and by the authority of the act." The removal of an obstruction of this sort was incident to the general duties of a surveyor of the highways. By section 12. "the surveyors are to view all highways, &c.; and in case they shall observe any nuisances, encroachments, obstructions, or annoyances, *contrary to the directions of that act*, they are to cause notice to be given to any person doing, committing, or permitting the same; and if such nuisances, &c. shall not be removed within twenty days after such notice, then the surveyors are authorized to remove the same, and are to be reimbursed their expenses by the party offending." The ninth section is confined to moveables only, but this is general, and extends to every obstruction. In the case of obstructions and nuisances to highways, the remedy by indictment is often inadequate, and more prejudicial to the prosecutor than the evil complained of. A summary power of removing annoyances is highly desirable: and the surveyors, rather than private individuals, ought to execute that power. But the surveyors may not be obstructed by a nuisance of this kind in respect of their individual convenience of passage, and, if not, they cannot plead the special justification which would be adapted to such a case. They justify, as acting in exercise of their public duty; and it is clear that whatever they are authorized to do in discharge of that duty, may be given in evidence under the general issue. The watch-house in question was an impediment to the execution of "the directions of the act," inasmuch as it impeded the freedom of the passage, which the surveyors
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were directed to preserve, and prevented the repair of the highway, which it was their duty to superintend.

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PARKE J. I can find no provision in the act of parliament, authorizing the surveyors to remove a building or house erected upon the highway. They are empowered by section 12. to remove any nuisances, encroachments, *obstructions*, or annoyances, made, committed, or permitted *contrary to the directions of that act*. By section 9. persons laying any stone, timber, &c. upon the highway are subjected to a penalty; and, by section 10., after notice by the surveyor, stone, timber, &c. laid within fifteen feet of the centre of the highway, may be removed by the owner of the adjacent lands, or any other person, by order of a justice of peace. But there is no clause which authorizes the removal of a building by the surveyors. The making of this watch-house, therefore, was not a thing done contrary to the directions of that act, within the twelfth section; and the pulling of it down was not a thing done in pursuance of the act, within the eighty-second section; the defendants, therefore, could not give it in evidence under the general issue.

TAUNTON J. concurred.

PATTESON J. Section 7. compels the possessors of land to lop the trees in a particular manner; and if they omit to do so after notice, two justices may order them to be cut. This seems to shew that it was not intended, by that act, to give the surveyors a power of removing things fixed to the freehold.

Rule refused.

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Saturday,
Nov. 3d.BAXTER *against* TAYLOR.

A reversioner cannot maintain an action on the case against a stranger for merely entering upon his land held by a tenant on lease, though the entry be made in exercise of an alleged right of way; such an act during the tenancy not being necessarily injurious to the reversion.

1 Bac 88.
1167.43

DECLARATION stated that a certain close called *Stoney Butts Lane*, situate in the parish of *Halifax* in the county of *York*, was in the possession and occupation of *J. H.*, *J. E.*, and *J. A.*, as tenants thereof to the plaintiff, the reversion thereof then and still belonging to the plaintiff; yet the defendant, well knowing the premises, but contriving to prejudice and aggrieve the plaintiff in his reversionary estate and interest, whilst the said close was in the possession of the said *J. H.*, *J. E.*, and *J. A.*, to wit, on, &c. wrongfully and unjustly, and without the leave and licence, and against the will of the plaintiff, put and placed upon the said close divers large quantities of stones, and continued the same for a long space of time, to wit, from thence hitherto; and also with the feet of horses, and the wheels of carriages, spoiled and destroyed divers parts of the said close, whereby the plaintiff was greatly injured in his reversionary estate and interest therein. Plea, not guilty. At the trial before *Parke J.* at the last assizes for the county of *York*, it appeared that the plaintiff was seised in fee of the closes mentioned in the declaration, which he had demised to tenants; that the defendant had with his horses and cart entered upon the close called *Stoney Butts Lane*; and that after notice had been given him by the plaintiff to discontinue so doing, he claimed to do so in exercise of a right of way. The learned Judge was of opinion, that although that might be good ground for an action of trespass by the occupier of the plaintiff's farm, it

it was not evidence of any injury to the reversionary estate, and therefore that the action was not maintainable; and he nonsuited the plaintiff, but reserved liberty to him to move to enter a verdict.

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F. Pollock now moved accordingly. Although the plaintiff had demised his land to tenants, yet this action is maintainable for the injury to the reversion. The defendant claimed a right of way, and persisted in going on the land after notice. The trespass, having been committed for the purpose of asserting a right, was calculated to weaken the evidence of the plaintiff's title. [*Parke J.* The tenant might have maintained trespass.] The landlord could not compel his tenant to bring the action; and, therefore, unless he has a remedy in this form of action, he has none; and he ought to have some. It is undoubtedly true that he could not maintain this action for a mere trespass, unaccompanied by any permanent injury or any claim of right; but it is different where the act is done to assert a right, and might be evidence of a right of way. [*Parke J.* Such an act done while the premises were out on lease, would not be evidence of any right as against the reversioner.] In *Young v. Spencer (a)*, which was case by the owner of a house against his lessee for years for opening a new door, whereby the house was weakened and injured, and the plaintiff prejudiced in his reversionary estate and interest in the premises, the facts were, that the lessee did open the door without leave, but the house was not in any respect weakened or injured by it: and it was held

(a) 10 B. & C. 145.

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**BAXTER
against
TAYLOR.**

that it ought to have been left to the jury to say whether there was not an injury to the plaintiff's reversionary right. And Lord *Tenterden* C. J. said, that it seemed to be clearly established, that if any thing be done to destroy the evidence of title, an action is maintainable by the reversioner. Here, then, it ought to have been left to the jury, whether the acts done by the defendant under a claim of right were not injurious to the plaintiff's reversionary interest, inasmuch as they were calculated to weaken his evidence of title.

TAUNTON J. I think there should be no rule in this case. *Young v. Spencer* (a) is not in point. That was an action on the case in the nature of waste by a lessor against his own lessee. Here the action is by a reversioner against a mere stranger, and a very different rule is applicable to an action on the case in the nature of waste brought by a landlord against his tenant, and to an action brought for an injury to the reversion against a stranger. *Jackson v. Pesked* (b) shews, that if a plaintiff declare as reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be necessarily prejudicial thereto; and the want of such an allegation is cause for arresting the judgment. If such an allegation must be inserted in a count, it is material, and must be proved. Here the evidence was, that the defendant went with carts over the close in question, and a temporary impression was made on the soil by the horses and wheels; that damage was not of a permanent but of a tran-

(a) 10 B & C. 145.

(b) 1 M. & S. 234.

transient

sient nature; it was not therefore necessarily an injury to the plaintiff's reversionary interest. Then it is said that the act being accompanied with a claim of right, will be evidence of a right as against the plaintiff, in case of dispute hereafter. But acts of that sort could not operate as evidence of right against the plaintiff, so long as the land was demised to tenants, because, during that time, he had no present remedy by which he could obtain redress for such an act. He could not maintain an action of trespass in his own name, because he was not in possession of the land, nor an action on the case for injury to the reversion, because in point of fact there was no such permanent injury as would be necessarily prejudicial to it; as, therefore, he had no remedy by law for the wrongful acts done by the defendant, the acts done by him or any other stranger would be no evidence of right as against the plaintiff, so long as the land was in possession of a lessee. In *Wood v. Veal* (a), it was held that there could not be a dedication of a way to the public by a tenant for ninety-nine years, without consent of the owner of the fee, and that permission by such tenant would not bind the landlord after the term expired. I think therefore that the plaintiff cannot maintain the present action; and there is not doubt sufficient to induce me to think that there ought to be a rule nisi for a new trial.

PATTESON J. I am of opinion that the nonsuit was right. *Young v. Spencer* (b) was not an action by the reversioner against a stranger, but by a landlord against his tenant. It was an action on the case in the nature

(a) 5 B. & A. 454.

(b) 10 B. & C. 145.

1832.

 BAXTER
 against
 TAYLOR.

of

1832.

**BAXTER
against
TAYLOR.**

of waste. To entitle a reversioner to maintain an action on the case against a stranger, he must allege in his count, and prove at the trial, an actual injury to his reversionary interest. It is said that this action is maintainable, because the plaintiff's title may be prejudiced by a trespass committed under a claim of right; but then for such an injury the action must be brought in the name of the tenant, who is the person in the actual possession of the land. It is true the landlord cannot bring an action in the tenant's name without his assent; but that, generally speaking, would be obtained without difficulty, and may be always made matter of arrangement between the landlord and his tenant. The landlord may even provide by covenant in his lease that he shall be allowed to sue in his tenant's name for any trespass committed on the land.

PARKE J. I am clearly of opinion that there was no injury to the plaintiff's reversionary interest; and to entitle him to maintain this action it was necessary for him to allege and prove that the act complained of was injurious to his reversionary interest, or that it should appear to be of such a permanent nature as to be necessarily injurious. A simple trespass, even accompanied with a claim of right, is not necessarily injurious to the reversionary estate, and what Lord *Tenterden* said in *Young v. Spencer (a)*, must be construed with reference to the subject matter then under consideration, an action on the case in the nature of waste by a reversioner against his tenant.

Rule refused.

(a) 10 B. & C. 145.

1832.

Roots *against* Lord DORMER.Saturday,
Nov. 3d.

CASE by the plaintiff as purchaser of growing crops sold under a fi. fa., for distraining and converting the said crops. Plea, the general issue. At the trial before *Gaselee J.*, at the *Buckinghamshire* Summer assizes 1832, it appeared that the crops were sold by auction under certain conditions, which were in writing. The sixth condition stated that the crops, lots 57, 58. &c. (to 67. inclusive), would be sold, subject to the covenants contained in a certain indenture of lease therein recited. The eighth condition was, "each purchaser of the crops to sign an agreement to fulfil, so far as they legally ought to do, the said covenants." Four lots were knocked down to the plaintiff at prices below 20*l.* respectively, but amounting in the whole to 38*l.*; and on the same day he, and three other purchasers, subscribed the following acknowledgment at the foot of the conditions:—
"We do hereby consent and agree to become the purchasers of the lot or lots specified in the annexed catalogue of sale, set against our names respectively, according to the terms mentioned in the foregoing conditions.
Witness our hands this 8th day of *March* 1830.

(Signed) *W. Roots*, lots 57. 59, 60. 66.
Thomas Jones, lot 62.
Charles Bush, lots 58. and 63.
Thomas Miller, lot, &c."

No stamp was affixed.

A verdict was found for the plaintiff, and leave given to move for a nonsuit on a point which it is unnecessary to state, and on which the Court refused a rule.

Storks

Where several lots are knocked down to a bidder at an auction, and his name marked against them in the catalogue, a distinct contract arises for each lot; and a memorandum signed afterwards by the bidder, stating that he agrees to become the purchaser of the several lots set against his name, does not require a stamp, though the aggregate exceed 20*l.* in value, no single lot being of that price.

7 Bac. 424.
2 M & H. 706.

1832.

Roots
against
Lord
DORMER.

Storks Serjt., in making this application, contended that the defendant was at all events entitled to a new trial, as the acknowledgment subscribed to the conditions was an agreement for the purchase of an interest in lands, to the value of more than 20*l.*; and, therefore, ought not to have been received in evidence without a stamp. The lots were, indeed, knocked down separately; but the agreement for them, as afterwards reduced into writing, was for the purchase of all in the aggregate.

PARKE J. I think this was a separate agreement for each lot. There was a distinct contract as each lot was knocked down. No stamp, therefore, was requisite.

TAUNTON J. concurred.

PATTESON J. I am of the same opinion. Suppose the plaintiff had complied with the conditions of sale as to three lots, and not as to the fourth. In declaring against him, must the agreement have been stated as one entire contract for all the four lots?

Rule refused (*a*).

(*a*) See *Emmerson v. Heelis*, 2 Taunt. 38. and the notice of it by Best J. in *Baldey v. Parker*, 2 B. & C. 44.

Monday,
Nov. 5th.

HORN against ION.

It is a good answer to a plea of bankruptcy, that the certificate was obtained by fraud, though the enactment to that effect in 5 G. 2. c. 30. s. 7., is not repeated in 6 G. 4. c. 16.

/ Bac. 661.

THIS was an action on a promissory note for 48*l.*, payable on demand. Plea, first, the general issue; secondly, a general plea of bankruptcy; and thirdly, a special

special

special plea of bankruptcy. Replication to the last plea that the supposed certificate in that plea mentioned was had and obtained by the defendant unfairly and by fraud, and upon this issue was joined. At the trial before *Parke J.* at the Summer assizes for *Westmoreland*, 1831, evidence was given to prove, and the jury found, that the defendant had promised to pay *Thomas Allen*, one of the creditors who signed the certificate, in full, and that *Allen* was thereby induced to sign it. It was objected that under the 6 G. 4. c. 16. s. 121. it was not competent to the plaintiff to insist on a trial at nisi prius that a certificate was void on the ground of fraud. The learned Judge reserved liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained for entering a nonsuit upon the objection made at the trial,

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 HORN
against
ION.

John Williams and *Archbold* in last *Trinity* term shewed cause(a). Wherever any one of the creditors is induced by money given by the bankrupt or by a third person, to sign the certificate, it is void on the ground of fraud generally, though there be no express provision in the 6 G. 4. c. 16. to that effect; first, because it contravenes the general spirit of the bankrupt laws, which is, that all the creditors should be placed on an equal footing, and that no one should have an advantage over another: secondly, because, as some creditors may be induced to sign because others have done so before, whom they suppose to be on a par with themselves, if the first creditors be in reality paid for signing, it will be a fraud on those who have received nothing, and who

(a) Before Lord *Tenterden C. J.*, *Littledale*, *Parke*, and *Taunton Js.*

have

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 against
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have been induced to sign by seeing the previous signatures. *Robson v. Calze (a)*, *Holland v. Palmer (b)*. [Parke J. The question is, whether since the late statute 6 G. 4. c. 16., a plaintiff is at liberty to shew at nisi prius that the certificate was obtained by fraud, or whether that be only a ground for an application to the Lord Chancellor to set it aside.] It is actually void at common law, because fraud vitiates every transaction. It is true that the 5 G. 2. c. 30. s. 7. enacts that in case any bankrupt shall be impleaded for any debt due before he became bankrupt, he may plead the general plea of bankruptcy, and the certificate shall be evidence of all prior proceedings, and a verdict shall thereupon pass for the defendant, unless the plaintiff in such action can prove that the certificate was obtained unfairly and by fraud; and this latter provision is not re-enacted by 6 G. 4. c. 16.: but as a certificate so obtained would be void at common law, the latter part of the enactment was unnecessary, and the omission of it therefore in the present statute is wholly immaterial.

T. Clarkson contra. *Robson v. Calze (a)*, and *Holland v. Palmer (b)*, were decided when the 5 G. 2. c. 30. was in force. The replication is clearly bad. By section 121. of the 6 G. 4. c. 16., every bankrupt is discharged from all debts, &c., in case he shall obtain his certificate of conformity, signed and allowed, and subject to such provision as is therein-after directed. Now here the certificate has been signed and allowed as directed. Section 130. enacts, that any certificate obtained shall be void in certain cases: viz., if the bankrupt shall have lost

(a) *Doug.* 228.(b) 1 *Bos. & P.* 95.

by gaming in one day 20*l.*, or within a year before his bankruptcy 200*l.*, by gaming or stock-jobbing, or if he shall have destroyed books, &c. If it had been intended to make a certificate void in other instances, that intention would equally have been expressed. The very omission of the enactment contained in the previous statute, as to a certificate obtained unfairly or by fraud; shews, evidently, a change of intention by the legislature.

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 HORN
 against
 LON.

Cur. adv. vult.

PARKE J. now delivered the judgment of the Court:

The question in this case was, whether, under the 6 G. 4. c. 16. s. 121., it is competent for the plaintiff, on the trial of a cause, to insist on the objection to a certificate, that one of the creditors had been induced to sign it by a promise made by the bankrupt, that he would pay him in full; and that point was reserved for the consideration of the Court. A rule nisi was granted; and cause has been since shewn. We have considered the case, and are of opinion that it is competent for the plaintiff on these pleadings to take this objection, and that it must prevail. The question arises entirely from the difference in the language of the 5 G. 2. c. 30. s. 7. and 12., and the 6 G. 4. c. 16. s. 126. and 130. The former act, s. 7., after providing that the general plea of bankruptcy may be pleaded, and that the certificate shall be evidence of all prior proceedings, goes on to enact that a verdict shall thereupon pass for the defendant, “*unless* the plaintiff can prove that the certificate was obtained unfairly and by fraud, or unless the plaintiff can make appear any concealment by the bankrupt to the value of 10*l.*”

But in the new bankrupt act, in the section (126.) which

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gives the general plea of bankruptcy, and makes the certificate evidence, there is no such condition inserted; and in the 130th section, which enacts in what cases the bankrupt's certificate shall be void, the case of its being obtained unfairly or by fraud is not mentioned. And the point to be decided is whether the intention of the legislature in making this omission, was to prevent a certificate being thereafter impeached on the ground of fraud or not. Now if the former bankrupt act had never existed, and the present statute alone been enacted, we conceive that there is no doubt but that under this statute a certificate obtained by fraud would have been void; on the general principle, that fraud vitiates all contracts and instruments. It is only from the comparison between the language of the repealed and the existing statute, that the argument of intention is derived. But that difference may be explained without resorting to the supposition of a change of intention. The provisions of the new law are differently arranged, and in making that new arrangement, the clause in the old act may have been omitted simply on the ground that it was unnecessary to introduce an express enactment of that which the law implies. And indeed, when it is considered how important such an alteration is, and what serious consequences to the honest creditor would arise from it, it is difficult to imagine that the legislature would have made it at all; and if they intended to make it, it is reasonable to suppose that they would have made it by a positive and express enactment. It is true, that the 130th section contains provisions expressly avoiding the certificate in certain cases; but those are for matters extrinsic, as for losing money at play, gambling in the funds, destroying or falsifying

falsifying or making false entries in his books, concealing property to the value of 10*l.* or upwards, &c. But no inference arises from this section, we think, that the legislature did not mean to impeach the certificate for fraud connected with the very obtaining of the certificate; and if it were otherwise, the consequences would be serious; for then the legislature would have provided no check against this sort of fraud, except the provision in the 125th section, rendering the contract to pay the stipulated consideration invalid. The certificate could not be impeached at law for fraud; and it would be difficult to support the authority of the Chancellor to cancel the certificate for the same reason; for if the legislature have meant that the objection of fraud shall not be used against a certificate, it must apply equally to all courts. The result would be, that the fraudulent bankrupt would obtain an advantage which he would not be backward to use.

Our opinion therefore is, that the legislature had no such intention as has been contended for, and that the certificate of the defendant may be and is invalidated on the ground of the fraud which has been found by the jury. The rule for entering a nonsuit must be discharged.

Rule discharged.

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against
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Monday.
Nov. 5th.

DOE dem. RANKIN *against* BRINDLEY.

VC- 703 A lease con-
E - 286 tained a pro-
F - 289 viso for re-
entry in case of
non repair
within three
months after
notice. The
landlord gave
notice, and
before the end
of the three
months, (which
would have
expired in
Hilary vacation
1832, brought
an ejectment.
During the
three months
the cause came
on for trial,
and the parties
agreed to an
order of Court,
directing that a
juror should be
withdrawn, and
the repairs
done by *Mid-*
summer.
Default being
made, the land-
lord brought a
second eject-
ment, without
further notice,
in *Trinity*
vacation, under
the statute
11 G. 4. and
1 W. 4. c. 70.
s. 36.

Held, first,
that the former
notice had not
been waived.

Secondly, that it could not be objected at nisi prius that the action had not been com-
menced within ten days after the right of entry accrued. pursuant to the act, this being
merely matter of irregularity: and further, that the objection was not well founded, the
right of entry having been only suspended by agreement of the parties.

4 Plac. 284.

EJECTMENT for messuages, mills, &c. At the trial
before Lord *Tenterden* C. J., at the last Summer
assizes for *Kent*, the facts appeared to be as follows: —
The defendant held oil-mills, &c. of the lessor of the
plaintiff, by a lease containing covenants to repair, to
fence and keep up fences, and to insure; and there was a
proviso for re-entry, if at any time the premises or the
fences should not be repaired within three months next
after notice in writing given by the landlord, or in case of
breach or default in the other covenants. There was no
specific covenant to repair within three months after notice.
On the 6th of *January* 1832, the lessor of the plaintiff
gave the defendant a written notice to do certain repairs to
the mills within three months. On the 10th he served the
defendant with a declaration in ejectment. That action,
as appeared by the particulars of demand, was grounded
on forfeitures said to be incurred by not sufficiently fencing
the premises, and by not insuring; but the first ground
was abandoned. The cause came on for trial at the
ensuing *Lent* assizes (*March* 12th, 1832); when an
order of Court was made by consent of the parties, that
a juror should be withdrawn, and that the defendant
should put the mills in repair, to the satisfaction of
surveyors and an umpire, on or before the following
24th of *June*. On the 28th of *March* the lessor of the

plaintiff

plaintiff accepted rent for the quarter ending on the 25th. The repairs were not done pursuant to the order of Court; and the defendant was thereupon served with a declaration in the present action, entitled, "*Thursday, 28th of June, in Trinity term, 2 W. 4.,*" the demise being laid on the 27th under the statute 11 G. 4., and 1 W. 4. c. 70. s. 36, 37. The particulars of demand stated this action to be brought for breach of covenant in not repairing. A verdict having been found for the plaintiff,

1832.

DOR dem.
RANKIN
against
BRINDLEY

Thesiger now moved for a new trial, on two grounds. First, no power of re-entry for non-repair is given by the lease, without a three months' notice. Here a notice was given previously to the first ejectment, but the landlord waived it by assenting to the order of Court, made at the Spring assizes, which enlarged the time for repairing, and in other respects introduced new terms, *Doc dem. Morecraft v. Meux (a)*. The acceptance of a quarter's rent afterwards was also a waiver. And no further notice having been given, it is the same with reference to this action, as if there had never been any. Secondly, if the notice of the 6th of *January* continued in force, the landlord became entitled to re-enter in the following *April*; and the statute 11 G. 4. and 1 W. 4. c. 70. s. 36., which authorizes the service of declaration in *Hilary* and *Trinity* vacations, requires it to be served within ten days after the right of entry accrues. The present ejectment, therefore, was improperly commenced.

(a) 4 B. & C. 606.

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 ———
 Do^r dem.
 RANKIN
 against
 BINDLEY.

PARKE J. I think there ought to be no rule. As to the first point, the notice to repair was given on the 6th of *January* 1832; and the right of re-entry, in default of repair, would have accrued in three months from that time. Before the expiration of the three months, an ejectment was brought; and the lessor of the plaintiff being unable to support that action, put an end to it by consenting to the order of Court made at the *March* assizes 1832. It was the same as if the parties after the 6th of *January*, and before the expiration of the three months, had made an agreement between themselves, that the time for repairing should be extended to the 24th of *June*: it was merely a consent to postpone the time of completing the repair for the benefit of the defendant; and on his failing to comply with the terms, the lessor of the plaintiff might justly insist on his right of entry, and bring a new ejectment after the expiration of the enlarged time. The receipt of rent was only an admission that the defendant was tenant until the 25th of *March*, and could not operate as a waiver of the forfeiture. As to the objection founded on the statute 11 G. 4. and 1 W. 4. c. 70. s. 36., it seems to me that that could not be taken at nisi prius; and if it could, the answer is, that the landlord's right to re-enter, which is said not to have been enforced in proper time, was postponed by agreement of the parties.

TAUNTON J. I am of the same opinion. The order of nisi prius did not supersede the notice, but only enlarged the time and suspended the right of re-entry.

PATTESON

PATTESON J. The notice to repair may be connected with the agreement at nisi prius in the first ejectment. The other point is mere matter of irregularity.

Rule refused.

1832.

—
Dor dem.
RANKIN
against
BRINDLEY.

CROSFIELD and Another, Assignees of BROSTER,
against Sir THOMAS STANLEY MASSEY STANLEY,
Baronet.

Monday,
Nov. 5th.

ASSUMPSIT for money had and received by the defendant, late sheriff of the county of *Chester*, to the use of the plaintiffs as assignees of *Broster*. Plea the general issue. At the trial before Lord *Lyndhurst* C. B., at the last Summer assizes for *Chester*, it appeared that *Broster*, in *April* 1831, executed a warrant of attorney to one *Stringer*, to confess judgment for 939*l.*, as an indemnity to *Stringer* for the payment of such monies, costs, &c., as *Stringer* might have to pay by reason of having joined *Broster* in certain promissory notes. *Stringer*, having been afterwards obliged to pay money on the notes, signed judgment on the warrant of attorney on the 6th of *February* 1832, and a *fi. fa.* was thereupon issued, under which a sheriff's officer took possession, and began to sell. On the 15th of *February*, during the sale, but when it was nearly over, notice was given to the sheriff's officer on behalf of *Broster's* creditors, that he had committed an act of bankruptcy, and that a docket was struck against him. The act of bankruptcy had in fact been committed on the 12th. The sheriff's officer finished the sale, and afterwards paid over the balance of proceeds to *Stringer*, on an indemnity. This action was brought to recover the amount

The statute 4/5 &c. ad. - 21
1 W. 4. c. 7. s. 7. exempting
judgments on
cognovit, and
by default, con-
fession, or nil
dicit, in any
action com-
menced ad-
versely and
without collu-
sion, from the
operation of
s. 108. of the
bankrupt act,
6 G. 4. c. 16.
does not extend
to judgments
on warrant of
attorney,
though given
without collu-
sion or inten-
tion of fraudu-
lent preference.
And a sheriff
having seized
and sold goods
on an execution
issued upon
such judgment,
and paying
over the pro-
ceeds after
notice of an act
of bankruptcy
committed by
the defendant,
is answerable
to the assignees
for money had
and received.

of

1 Dec. 570!

1832.

CROSFIELD
against
STANLEY.

of proceeds. The jury, under the direction of the learned Judge, found a verdict for the plaintiffs.

Jones Serjt. (pursuant to leave reserved) now moved for a rule to shew cause why a nonsuit should not be entered. This payment by the sheriff was protected by the statute 1 *W. 4. c. 7. s. 7. (a)*. By the bankrupt act, 6 *G. 4. c. 16. s. 108.*, it is provided that no creditor suing out execution on any judgment by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but he shall be paid rateably with them. The act of 1 *W. 4. c. 7. s. 7.*, reciting this enactment, provides that no judgment or execution on a cognovit actionem, signed after declaration filed or delivered, or judgment by default, confession, or nil dicit, in any action commenced adversely, and not by collusion for the purpose of fraudulent preference, shall be deemed within the former provision. It is true this act does not expressly mention warrants of attorney; but the object is to protect all judgments not obtained

(a) 1 *W. 4. c. 7. s. 7.* "And whereas by an act passed, &c. (6 *G. 4.*) intituled An Act to amend the Laws relating to Bankrupts, it is provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors. And whereas, by reason of such provision, plaintiffs have been and may be deterred from accepting a cognovit actionem, with stay of execution, whereby the expense of further proceedings in such action might have been and may be saved or diminished; for remedy thereof be it enacted, that no judgment signed or execution issued after the passing of this act on a cognovit actionem signed after declaration filed or delivered, or judgment by default, confession, or nihil dicit, according to the practice of the Court, in any action commenced adversely, and not by collusion for the purpose of fraudulent preference, shall be deemed or taken to be within the said provision of the said recited act."

by

by collusion, or with a view to fraudulent preference, and a judgment like this comes within the meaning of the clause. Another point taken at the trial was, that the action did not lie for the produce of goods sold before the sheriff had notice of the bankruptcy. *Notley v. Buck* (a) is no authority to the contrary, for there the sheriff was informed of the bankruptcy before he sold. Here, it is true, the sheriff had had notice when he received the purchase-money and paid it over; but he had sold the goods, and bound himself by that contract of sale to the purchasers, before any notice: and (if the recent decision in *Bulme v. Hutton* (b) be correct) the seizure and sale, without notice of the bankruptcy, did not render him a wrong-doer.

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CROSFIELD
against
STANLEY,

PARKE J. There is very little difficulty in this case, when the clauses of the two statutes are compared. The 1 W. 4. c. 7. s. 7., only alters the provision of the 6 G. 4. c. 16. s. 108. in the cases of a judgment or execution on a cognovit after declaration, or a judgment by default, confession, or nil dicit, in an action commenced adversely, and not by collusion for the purpose of fraudulent preference. Now this was not an execution on a judgment by cognovit after declaration, or judgment by default, confession, or nil dicit in any action commenced adversely, but upon a warrant of attorney. The case, therefore, is not within the statute 1 W. 4. c. 7. Then is it within section 108. of the bankrupt act? To take it out of that section, the endeavour must be to engraft upon the words there used, "any judgment obtained by default, confession, or nil

(a) 3 B. & C. 160.

(b) 2 Tyr. 17. 2 Cro. & Jer. 19.

dicit: "

1832.

CROSFIELD
against
STANLEY.

dicit;" the terms of the other act, "by collusion for the purpose of fraudulent preference;" but we cannot adopt that construction; the clause is general and applies to all cases. As to the other point, there is no occasion here to be embarrassed with the case of *Balme v. Hutton* (a): because, in this instance, all the money was received and paid over by the sheriff after notice of the bankruptcy; and the action is for money had and received. I am therefore of opinion that there should be no rule.

TAUNTON J., and PATTESON J., concurred.

Rule refused.

(a) The judgment of the Court of Exchequer in this case, which was contrary to the recent decision of the Court of K. B. in *Dillon v. Langley*, 2 B. & Ad. 131. was reversed in the Exchequer Chamber, on error, during this term. *Hutton v. Balme*, 2 Tyr. 620. 1 Cro. & M. 262.

Monday,
Nov. 5th.

JOHN CASTLEDINE and MATTHEW CASTLEDINE
against MUNDY.

(In Error.)

Error will lie to B. R. on a judgment of C. B. for error in fact.

A court of error will give judgment of reversal, if there be error in law apparent on the face of the record, though error in fact only be assigned.

THIS was a writ of error on a judgment of the Court of Common Pleas. Declaration stated that the defendants below, after the making of the statute 8 Hen. 6. c. 9., on, &c., with force and arms, and with a strong hand, and against the form of the statute in such case made and provided, entered a certain messuage, &c. of the plaintiff, and in a forcible manner put out, disseised, and dispossessed and expelled the plaintiff therefrom, and with a forcible manner, and with a strong hand, kept and continued the plaintiff therefrom for a long space

space of time, to wit, from thence hitherto, &c., by means whereof the plaintiff lost and was deprived of the use of the said dwelling-house, to wit, at, &c. The second and third counts charged the defendants with breaking and entering the plaintiff's dwelling-house, &c., to plaintiff's damage of 500*l*. The defendants appeared in person, and suffered judgment by default. On enquiry before the sheriff, the jury found that the plaintiff had sustained damages on occasion of the premises, besides costs, to the amount of 100*l*.; and the judgment was, that the plaintiff do recover against the defendants the sum of 300*l*., being treble the amount of the damages found by the inquisition, and the sum of 193*l*. 18*s*., being treble costs. Upon writ of error to this Court, the plaintiffs (the defendants below) assigned for error that *Matthew Castledine* appeared in the suit in his own proper person, although at the time of his said appearance, and also at the time of giving judgment, he was under the age of twenty-one years, to wit, of the age of seventeen years and no more, in which case the said *Matthew* ought to have been admitted to appear in the Court below, to defend the suit aforesaid by his guardian, and not in his own proper person; wherefore they prayed that the judgment might be revoked, annulled, and altogether held for nothing, and that they might be restored to all things which they had lost by occasion of the judgment, &c. To this the defendant in error pleaded in nullo est erratum. The case was argued in *Trinity* term by

1832.

CASTLEDINE
against
MUNDY.

Platt for the plaintiffs in error. An infant defendant can only appear by guardian, even when he is sued as
co-

1832.

CASTLEDINE
against
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co-executor with others, *Frescobaldi v. Kinaston* (a); and in *Tidd's Practice*, 9th edit. 99., it is said, that common bail cannot be filed for him under the statute, though he be sued jointly with other defendants; and for this *Bligh v. Minster*, *Trin.* 28 G. 3. K. B., is cited. It may be said that this was a defective assignment of error in fact; but assuming that to be so, or that the matter assigned is no error, then, the defendant in error having pleaded in *nullo est erratum*, and that plea being, in effect, a demurrer, the Court may look at the whole record, and pronounce that judgment which, upon the whole, appears to be right: *Le Bret v. Papillon* (b). Now here, even assuming that the infancy of one defendant below cannot be insisted on as a ground of error, still the judgment is erroneous, because general damages are assessed on all the counts, and it is, therefore, impossible to say what portion is to be ascribed to the first count, on which alone the plaintiff is entitled to recover treble costs and damages.

Fynes Clinton contra. The assignment of errors itself is bad, inasmuch as it concludes with a prayer that judgment may be reversed, whereas it ought to have concluded with a verification; *King v. Gosper and Shire* (c). And the plaintiffs in error having assigned an error in fact, viz., that *Matthew Castledine* was within age, and had not appeared by guardian but in his own proper person, could not afterwards also assign error in law; and, if so, they must not now be permitted to do that indirectly which they could not do directly. They cannot, in this state of the proceedings, be in a better situation than they would have

(a) 2 Str. 784.

(b) 4 East, 502.

(c) Yelv. 58.

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been if they had offered to verify the fact alleged, and the parties had pleaded to issue; and then they could not have assigned as error in law that general damages were assessed on all the counts. This case differs from *Frescobaldi v. Kinaston* (a): there the assignment of error was that the defendant below had appeared by attorney. Here he appears in his own proper person. [*Parke J.* It is said in an *Anonymous Case*, in *Sayer's Rep.* 51., that an infant cannot bring a penal action, because he cannot appear in person or by attorney; and in *Co. Litt.* 135. b, that when an idiot doth sue or defend, he shall not appear by guardian, or prochein amy, or attorney, but he must be ever in person; but an infant or a minor shall sue by prochein amy and defend by guardian.] The fact of one of the defendants being an infant, and having appeared by guardian, is not a ground for reversing the judgment altogether. [*Parke J.* In *Bird v. Orms* (b), an entire judgment against two in trespass was reversed, one of them having appeared by attorney instead of by guardian. So in *King v. Marlborough and Craker* (c), in ejectment, "the error assigned was that *Craker*, one of the defendants, at the time of the judgment was within age, and appeared by attorney where it ought to have been by his guardian, the judgment being upon verdict, and it was thereupon demurred; for it was said that this was not error, but *quoad* him within age." But it was decided, the damages and costs being entire, that the judgment was reversable for both.] There the judgment was after verdict; here it was by default. In both cases the action was founded in tort, and it was not then settled, as it has been since

(a) 2 Str. 784.

(b) Cro. Jaq. 289.

(c) Cro. Jac. 303.

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in *Merryweather v. Nixan* (a), that there is no contribution between tort-feasors. [Lord Tenterden C. J. Will a writ of error for a matter in fact lie in this Court on a judgment of C. B.? In *Com. Dig. Pleader*, 3 B. 1., it is said that error may be brought in the same Court where the judgment was given, for error in fact, as that the defendant appeared by attorney, being an infant; and then it is added, for error in fact *it must be in the same Court*, and 1 *Sid.* 208. is cited.]

Platt in reply. In *Frescobaldi v. Kinaston* (b) and *Bird v. Orms* (c), matters of fact were assigned for error in this Court upon a judgment in C. B.

Cur. adv. vult.

PARKE J. now delivered the judgment of the Court.

This was a writ of error from the judgment of the Court of Common Pleas in an action of trespass for forcible entry on the statute 8 *Hen.* 6. c. 9. The declaration contained three counts; one on the statute, and two for trespasses at common law. The defendants appeared in person and suffered judgment by default, and general damages were assessed on all the counts, for the treble amount of which, and treble costs, final judgment was given. The assignment of errors was as follows: "that the said *Matthew* appeared in the suit aforesaid in his own proper person, nevertheless the said *Matthew* at the time of his said appearance, and also at the time of giving the judgment aforesaid, was under the age of twenty-one years, to wit, of the age of seventeen years, and no more; in which case the said *Matthew* ought to

(a) 8 *T. R.* 136.

(b) *Str.* 784.

(c) *Cro. Jac.* 289.

have

have been admitted to appear in the court aforesaid to defend the aforesaid suit by his guardian, and not in his own proper person; therefore in that there is manifest error, wherefore they pray that the judgment aforesaid may be revoked, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the judgment aforesaid," &c. To this the defendant in error pleaded in nullo est erratum.

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An assignment of error in fact ought to conclude with an "hoc paratus est verificare;" and the case of *King v. Gosper and Shire* (a) is in point, that such an assignment of error as this, without a verification, is bad; and if there be no other error on the record, the judgment ought to be affirmed. But in this case the judgment is clearly erroneous, for general damages are assessed on all the counts, and it is, therefore, impossible to say what portion is to be ascribed to the first count, on which alone the damages and costs could by law be trebled; and yet judgment is given for the treble amount of the whole. The only question, then, is, whether it is competent for the plaintiff in error to avail himself of this objection; or, more properly, whether the Court is bound, ex officio, to take notice of it, there being no assignment of error in law.

The general rule is, that the Court, ex officio, must give the proper judgment according to the right appearing upon the whole record, *Le Bret v. Papillon* (b), *Charnley v. Winstanley* (c), *Fraunces's case* (d). In a case cited in *Dive v. Manningham, Plowden*, 66., on not

(a) *Yelv.* 58. *Walker v. Stokoe, Carth.* 367. *Sheepshanks v. Lucas*, 1 *Burr.* 410.

(b) 4 *East*, 502.

(c) 5 *East*, 271.

(d) 8 *Coke*, 93. a.

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guilty by one found against him, and a plea in bar by another found for him, it is said, "inasmuch as it appears to the judges by the record, that the plaintiff had no title, they, *ex officio*, ought to give judgment against the plaintiff;" and afterwards it is said, "So always, if it appear to the Court that the plaintiff has no title, he shall not have judgment, although the defendant admits his title: and though the defendant by his bad conclusion has concluded himself of his advantage, the plaintiff shall be barred by the Court *ex officio*, if so be it appears he has no title."

And there is no difference, in this respect, between the office of a court of error, and of a court of original jurisdiction, 4 *East*, 502. Thus, in *Bishop's case* (a), the Court agreed, that where an original writ was removed by certiorari, and varied from the declaration, the judgment should be reversed, although that error was not assigned.

In *Carleton v. Mortagh* (b), Lord Holt says that, "if a bad plea in bar be pleaded to a bad declaration, or to a bad assignment of error, it is idle; and the Court shall take no notice of the insufficiency of it, but shall judge on the record."

The result of these authorities is, that the Court ought to give judgment of reversal, if there be error in law; notwithstanding no error in law is assigned: and though it be true, that a plaintiff in error will thus have the same advantage indirectly, as if error in fact and in law were both assigned (which cannot be permitted directly); this does not appear to us to be a valid objection. It is somewhat analogous to the case of a plea and demurrer

(a) 5 *Coke*, 376.(b) 6 *Mod.* 208.

to the declaration, which cannot be joined; and yet a defendant after a plea, may, on demurrer to the plea, in arrest of judgment, or on a writ of error, take all the objections which are not cured by the plea or otherwise, and which he could have done on general demurrer to the declaration.

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One question was raised on argument, whether a writ of error for a matter of fact would lie in this Court, on a judgment of the Common Pleas? It is clear from the authorities that such a writ of error *may* be brought in the Court of Common Pleas, but there is no authority that it *must*. It will not lie in the Exchequer Chamber; not because that Court could not try an issue, but because the statute 27 *Eliz. c. 8.*, under which it was constituted, was enacted to give a more speedy remedy for error which lay in parliament; but errors in fact were examinable in the King's Bench and not in parliament: and, therefore, the Court of Exchequer Chamber had no cognizance of such errors, *Roe v. Sir John Moore (a)*. But that a writ of error for error in fact will lie in the King's Bench from the Common Pleas, the cases cited in argument shew; for they were instances where such errors were assigned in this Court. The judgment of the Court below must, for these reasons, be reversed.

Judgment reversed.

(a) *Comyns*, 597.

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Monday.
Nov. 5th.BUSSEY *against* STOREY.

24 -466 By an act of the 52 G.3., entitled "An Act for more effectually repairing the Road from Boroughbridge, in the County of York, to the City of Durham," it was in section 25. enacted, "That the respective tolls therein mentioned should, subject to the restrictions therein-after contained, be demanded and taken at every toll-gate and turnpike which should be continued or erected by

ASSUMPSIT for money had and received. Plea, general issue. At the trial before Bayley B., at the Summer assizes for the county of *Durham*, 1830, the jury found a special verdict to the following effect:—

By an act of parliament of the 18 G. 2. c. 8., entitled An Act for repairing the high Road leading from *Boroughbridge* in the County of *York*, through *Northallerton* in the same County, to *Croft Bridge* on the *River Tees*, and from thence through *Darlington* in the County of *Durham*, to the City of *Durham*, certain trustees were appointed for surveying, ordering, amending, and keeping in repair the said road, and likewise for putting in execution the powers by the said act given, and they were by the said act empowered to erect

virtue of that act, from the person using or attending any carriage, before any such carriage should be permitted to pass through the same."

By section 28. it was enacted, that no more tolls should be taken from any person for passing and repassing the same day, with the same horses or carriages, through any of the toll-gates or turnpikes erected by virtue of that act in the whole length of the said road from *Boroughbridge* to the city of *Durham*, nor upon the several parts thereafter specified, than as thereafter mentioned, viz. six tolls on the whole length, and on certain specified parts, two tolls each.

By section 37. it was enacted, that no toll should be demanded or taken for any carriage which could only cross the said road, and which should not pass more than 100 yards thereon.

By section 68. all persons, counties, townships, &c. and bodies corporate who by reason of tenure or otherwise had been used to repair any part of the said road, should continue liable to such repairs:

Held, that the words *said road* in the exempting clause, by reference to the title of the act, and to the nearest description of the road, which was in section 28., imported the whole space between *Boroughbridge* and the city of *Durham*, and, therefore, that a cart which had passed more than 100 yards along the road, including a part repairable by the county as being at the end of a bridge, but which had gone less than 100 yards, exclusive of that part, was not exempt from toll: and that the liability of the county to repair that part did not render it unreasonable that such part should be included in the 100 yards for passing over which toll was demandable.

And quære whether, under this act, the road trustees might not be liable, in case of default by the county, to employ their money in repairing the 300 feet at the end of a bridge?

turn-

turnpikes in or across any part or parts of the said road, and also toll-houses upon the same, and to demand and take thereat the tolls in the said act specified, which tolls were vested in the trustees, to be applied to and for the amending and keeping in repair the road aforesaid in such manner as in the act is directed. This act was continued and enlarged (certain new tolls being granted to the said trustees) by an act, 22 G. 2. c. 32., entitled *An act for enlarging the terms and powers granted by the act passed in the 18 G. 2. (the act above recited), and for making the same more effectual.* By an act of the 32 G. 3. c. 118., for enlarging and altering the terms and powers of the two acts of parliament passed in the 18 & 22 G. 2., and for reducing the said acts into one, and for more effectually repairing and keeping in repair the said road, the several powers contained in the said two recited acts were, by the second section, consolidated, and further term granted for the purpose of widening, repairing, and keeping in repair the said road leading from *Boroughbridge*, &c., describing it as in the first mentioned act. The 32 G. 3. was continued and amended by an act of the 41 G. 3. c. 4.

By a subsequent act, 52 G. 3. c. 38., entitled *An act for more effectually repairing the road from Boroughbridge, in the county of York, to the city of Durham,* after reciting the last two acts by their titles (in which the road is described as before stated), and that the trustees had borrowed considerable sums upon the credit of the tolls to be taken on the said road, which remained unpaid, and that it was necessary to grant further tolls and a further term, and further, that it would be convenient that all the requisite tolls, powers, and pro-

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visions in respect of the same road, should be consolidated in one act of parliament; the said two acts were repealed, and a new term and tolls granted. By the 37th section of this last act, amongst other exemptions from tolls, it was enacted, that no tolls should be paid for any horses, cattle, beasts or carriages, *which should only cross the said road, and should not pass more than 100 yards thereon.* The 68th section of the act is as follows: — “ And be it further enacted, that all and every person and persons, counties, townships, parishes, hamlets, vills, and places, and the inhabitants thereof respectively, and bodies politic and corporate, who, before the making of the said recited acts or this act, have or hath used, or of right ought, by reason of the tenure of any lands, tenements, or hereditaments, or on any other account or accounts, to repair any part or parts of the said road, or any bridge, drain or watercourse in or upon the same, shall, notwithstanding this act, be subject and liable to such repairs, in the same manner as they and every of them have or hath heretofore usually been, or would have been in case the said recited acts or this act had not been made.” The 69th section provided for the statute duty. The 70th section is as follows: — “ That it shall be lawful for the said trustees, and they are hereby authorized and empowered, to compound or agree by the year or otherwise with any of the inhabitants or occupiers of lands, tenements, or hereditaments, of or in any of the parishes, townships, or places, in which the said road shall lie and be situate, for a certain sum of money in lieu of the whole or any part of their statute work; or to compound with the surveyor of the highways for any such parishes, townships or places, for the whole or any part of the
statute

statute work liable to be performed within the same respectively ; all which composition monies shall be from time to time paid in advance, and shall be applied in the repair of the said road.” (a)

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On the 7th of *June* 1830, the defendant was collector at *Croft Bridge* of the tolls authorized to be taken by the recited act of the 52 G. 3.; and on that day the plaintiff came upon the road in question with two laden carts, each drawn by one horse, from a road leading from the depôt of the *Stockton and Darlington* railway company, within the distance of 100 yards from the foot of *Croft Bridge* on the *Durham* side, and passed over *Croft Bridge* and along 186 yards of the road beyond the foot of it on the *Northallerton* side, and then turned out of and finally quitted the road in question for one leading to *Richmond*. The plaintiff claimed to pass through the said gate with his carts and horses without payment of toll, by reason, as he alleged, of not passing 100 yards on the road maintained by the trustees of the said road. The defendant refused to allow him to pass through the toll-gate, with the said carts and horses, until he had paid 10*d.*, being the amount of toll appointed by the table of tolls at the said toll-gate to be taken, for two carts, each drawn by one horse and laden with coal, which sum the defendant demanded and received from the plaintiff.

The trustees of the said turnpike road do not repair or contribute to the repair of the road over *Croft Bridge*, and 300 feet at each end thereof; but the inhabitants of the respective counties of *York* and *Durham* exclusively repair the same out of their county rates. The gate at *Croft Bridge*, and also a gate near to *Topcliffe*

(a) Section 28., which was also much relied upon in the argument, will be found at p. 107. post.

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Bridge, were erected and continued at those places for the purpose of taking toll for the road, and they are built upon parts of the approach to the respective county bridges there; which parts are severally repairable by the counties of *York* and *Durham*, and not by the trustees of the said road. No statute work is done by the inhabitants of the respective parishes, townships, or places of *Harworth* in the county of *Durham* and *Croft* in the county of *York*, in respect of the said road over *Croft Bridge*, and 300 feet at each end thereof.

The plaintiff with his carts and horses did not, on the said 7th day of *June*, pass over a greater extent than eighty-six yards of the said turnpike road; unless the road over *Croft Bridge*, or the 300 feet at either end thereof, repairable by the respective counties of *York* and *Durham* as aforesaid, is to be taken as part of it.

Tindal C. J. and *Bayley* B., sitting as the Court of Pleas of *Durham*, were of opinion (after argument), that the carts in question were liable to the toll, and gave judgment for the defendant. A writ of error having been brought, the case was argued in last *Trinity* term (a).

Cresswell for the plaintiff in error. The carts mentioned in the special verdict were not liable to toll, inasmuch as they had not travelled along 100 yards of the road repaired by the trustees under the statute 52 G. 3. c. 38., by which the toll was imposed. The toll, being a charge upon the subject, must be imposed in clear unambiguous words. If there be any doubt, the public must have the benefit of it, *The Leeds and Liverpool Canal Company v. Hustler* (b). There, but for the act imposing the toll, the party would never have had

(a) Before Lord *Tenterden* C. J., *Littledale*, *Parke*, and *Taunton* Js.

(b) 1 B. & C. 424.

the use of the canal. It was not, therefore, a burden in derogation of any pre-existing right. Here it is, and therefore the rule of construction applies more strongly, for, with or without the toll, the plaintiff would have had the use of *Croft Bridge*. It cannot be supposed that the legislature would have imposed this toll without giving some adequate consideration, and that consideration is the *repair of the road*, and the statute itself only gives the toll where the road has been used for 100 yards and upwards. Besides, turnpike acts imposing tolls on those who use the road, are intended for the relief of parishes through which the road runs, and not of counties, and the act in question must be construed with reference to that object. The 32 G. 3., passed for amending the first two acts for repairing the road in question, enacts by section 38. that persons liable to repair any particular part of the road, or any bridge or bridges upon the road, shall continue so. The turnpike act, 13 G. 3. c. 84. s. 34., provides, that no person shall be liable to pay toll at any toll-gate across or on the side of any turnpike road, or be subject to any penalty for any carriage, horse, or beast, which shall only cross such road, and shall not pass above 100 yards thereon, *except over some bridge erected at a considerable expense by the trustees of such turnpike road*. This clearly proves that the legislature did not consider that the use of any bridge not occasioning expense to the trustees would be a consideration for the payment of toll. And where a toll is claimed by prescription, in consideration of repairs done, it is clear that the repair of a road from *A.* to *B.* is no legal consideration for demanding a toll on a road from *A.* to *C.* : the toll can only be taken for the use of the very road repaired. Why should it be presumed that

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the legislature meant to adopt a different rule here, and to make the use of a road along a bridge not repaired by the trustees a consideration for paying the toll to them? The presumption is against the present claim of toll, and the question, then, is, whether the language of the statute imposing it is so clear and precise that no doubt can be entertained as to the true construction? The point to be ascertained is the meaning of the expression *said road* in the exempting clause in the 52 G. 3. It is manifest, from an examination of the different provisions in that and the former statutes relating to the road, that "*the said road*" means the road to be repaired by the trustees with the tolls to be taken for the use of it. In a great many instances the expressions "*the said road*," or "*the road* intended to be repaired," appear to be used in a manner that clearly excludes the bridge in question, and the 100 yards at each end which are not repairable by the trustees. Nor is it clear that those expressions do, in any one instance, include the bridge. Before any of the statutes in question were passed, the plaintiff might have passed, with his carts, along the road in question without payment of any toll. Then, the road being found so bad that it could not be repaired by the ordinary method provided by the common law, the legislature passed the first statute, 18 G. 2. c. 8., entitled *An Act for repairing the Road from Boroughbridge, through Northallerton, to Croft Bridge, on the River Tees, and from thence through Darlington to Durham*, and by that act, s. 1., the trustees are empowered to erect toll-gates in or across any part of the said road, and to take the tolls therein mentioned, which, are to be applied to the *keeping in repair the said road*. By section 10. the trustees are empowered

powered to dig for gravel for repairing the roads aforesaid. This would give them no power to take gravel to repair the bridge. Neither would the power given to them to widen the road entitle them to widen the bridge. The statute duty to be done on the roads directed to be repaired is to be settled by justices at petty sessions. But no statute work is to be done on the bridge, or on the 100 yards at the end; that is, therefore, no part of the *said road*. Again, lands liable to the repair of roads directed by the act to be repaired are to continue so, and the rents to be paid to the trustees or their collector. This would not authorize them to receive the rents of lands liable to the repair of *Croft Bridge*. The second statute, 22 G. 2. c. 32. is in terms similar to the former act, and throughout speaks of the *said roads*, and by one clause, persons travelling on the road intended by the former act and that act to be repaired, are subjected to a penalty for going over any person's ground to avoid the toll. That would not apply to a person travelling only along the road repaired and repairable by the county, and not by the trustees. By the stat. 32 G. 3. c. 118. the road to be repaired is described in the title and preamble, and by sect. 2. the powers of the former act are continued for repairing the *said road*, again describing it as before. The property in gates, lamps, &c., and in all dung and soil gathered off *the said road*, is vested in the trustees. That would not give to them lamps, gates, &c. upon, or soil gathered off the bridge or the approaches to it; and if so, the words "said road" do not include the bridge or 100 yards. By s. 12. the tolls are to be taken for repairing the *said road*: by s. 21. the tolls are to be applied to the repair of the
said

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said road; and there is afterwards a power given to get materials for repairing the said road; that cannot include the bridge: and by s. 38., persons or counties liable to repair any part of the said road, or any bridge in the *said road*, are to remain liable as before; and where lands are liable to repairs of *the said road* (omitting bridges), the rents are to go to the person appointed by the trustees. There the word *road* clearly does not include bridge. By the statute 41 G. 3. c. 4. the former acts are recited and continued, and larger tolls given. The 52 G. 3. c. 38. recites the former acts, and that it would be convenient to continue all former provisions relating to the said road, and to consolidate them; and s. 21. gives power to erect or continue toll-houses and gates “in, or upon, or across the said road *intended to be repaired.*” It may be said, that where individuals are liable to repair the road *ratione tenuræ*, the use of that part of the road for 100 yards would make a person liable to the toll. But that does not create any substantial difficulty. The person liable to repair *ratione tenuræ*, or a township liable by prescription, are only substituted for the parish upon which the common-law liability rests; and notwithstanding such special liability the trustees are authorized, and if so, compellable, to expend the tolls in those parts of the road as well as the parts repairable by parishes: consequently the use of those roads, inasmuch as they derive benefit from the tolls, is a consideration for the payment.

Alexander contra. The plaintiff's carts were liable to toll, inasmuch as they travelled along 100 yards of the road leading from *Boroughbridge* to the city of *Durham*. There is nothing in any of the acts to restrain

strain the meaning of the exempting clause to the parts of the road repairable by the trustees; and such a distinction would be very inconvenient, for many parts would be free from toll which are repairable by individuals *ratione tenuræ*: and in some parts one side of the road might be so repairable, and not the other. The question must mainly depend upon the construction put upon the statute 52 G. 3. c. 38., which repeals the former acts. Section 25. enacts, "that the respective tolls therein mentioned, subject to the restrictions thereafter contained, shall be demanded and taken at each and every toll-gate and turnpike which shall be continued or erected by virtue of that act, from the person or persons using or attending any horse or carriage, before such horse or carriage shall be permitted to pass through the same." By this clause, the toll is imposed in plain, unequivocal language: and the question is, whether the carts mentioned in the special verdict, are exempted from the toll, to which they are otherwise clearly subject, by the enactment in section 37., that no toll shall be payable for any horses or carriages "which shall only cross the said road, and shall not pass more than 100 yards thereon." Now the *said road*, by reference to the title and preamble of the act, imports *the whole line of road from Boroughbridge to the city of Durham*; and by reference to section 28., which contains the nearest preceding description of the road, it has the same import. That section enacts, that no more toll shall be demanded for passing and repassing on the same day, with the same horses or carriages, through all or any of the toll-gates to be continued or erected by virtue of that act, *in the whole length of the said road from Boroughbridge to the city of Durham*, nor upon the several parts thereof

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thereof after specified, than as thereafter mentioned, viz. upon the whole length of the said road, no more than six tolls; and upon other parts therein specified, (of which that between *Northallerton* and *Darlington* is one) no more than two tolls. The toll-gate, where the toll in question was taken, is recognized by the 22 G. 2. c. 32. s. 6., as being in and upon *the said road*. It is there described as the gate built, *and now standing in and upon the said road at Croft Bridge*; and in the 32 G. 3. s. 38., county and riding bridges are spoken of as *lying in and upon the said road*; they are treated, therefore, as part of the road, that is, the road from *Boroughbridge to Durham*.

Cur. adv. vult.

PARKE J. now delivered the judgment of the Court. This question arises on a writ of error from the judgment of the two learned Judges (Lord Chief Justice *Tindal* and Mr. Baron *Bayley*) constituting the Court of Pleas at *Durham*, upon a special verdict. The question is, whether the plaintiff's carts, which passed through the turnpike at *Croft Bridge*, in that county, but did not pass more than 100 yards on the road, exclusive of the part at the end of the bridge which the county are bound to repair, were exempt from toll under the 52 G. 3. c. 38. s. 37., a local turnpike act. We are of opinion that they were not, and that the judgment of the Court below ought to be affirmed.

This act of parliament repeals those of the 32 G. 3. and 41 G. 3., the provisions of which, and of the older statutes relating to this road, are only so far material as they may aid in the construction of the enactments of the existing statute. In order to decide the point in question, we must look to the language of this act.

Before

Before I proceed to do this, it is to be observed, that it is a mistake to suppose, as was urged in the argument on behalf of the plaintiff in error, that the object of this and other turnpike acts is to relieve parishes and townships from the burthen of repairing the highways. Their object is to improve the roads for the general benefit of the public, by imposing a pecuniary tax in addition to the means already provided by law for that purpose. The obligation to maintain all public roads (with the exception of those which are to be repaired *ratione tenuræ* or *clausuræ*) is a public obligation, and in the nature of a public tax. The repairing by parishes or townships of some part, and by counties of other parts, are merely modes which the law has provided for discharging that obligation. It is their share of the public burthen, which those districts have to pay, and which is imposed for the general benefit of the community, and tolls are an additional tax for the same purpose.

But as this statute does impose a tax, the usual rule of construction must be applied to it which is adopted in similar cases, and the subject must not be charged unless the intention to charge clearly and distinctly appear.

Are, then, the words of this statute clear and distinct? It is entitled "*An Act for more effectually repairing the Road from Boroughbridge, in the County of York, to the City of Durham;*" and it enacts (section 25.) that certain tolls shall be demanded and taken *at each and every toll-gate* and turnpike which shall be *continued* or erected by virtue of the act, from any person attending a carriage, before such carriage shall be permitted to pass; but it provides (section 37.) that no toll shall be

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be taken for any carriages which only cross *the said road*, and shall not pass more *than 100 yards thereon*.

The statute therefore, in clear words, imposes the tax on carriages which go through a turnpike gate, and pass more than 100 yards *on the said road*; and the term “the said road,” in grammatical construction, refers either to the title of the act or to the nearest preceding description of the road (which is in section 28.); and on either supposition, the road is the *whole* space between *Boroughbridge* and the city of *Durham*. And, besides, the act (section 68.) contemplates that *counties* will have to repair some parts *of the road*; and what other parts can those be, than the space of 300 feet at the ends of the bridges?

Add to this, that the toll-gate in question, which is erected within that distance, is recognized as being *on the road*, by 22 G. 2. c. 32. s. 6., and no doubt its continuance is authorized by the twenty-first section of the present act, as a toll-gate “across the road thereby intended to be repaired.”

The words, therefore, of the act are clear; and the construction should be according to those words, unless it can be shewn that such construction would be unreasonable, or inconsistent with the apparent intention of the framers of the act. It is said that it would be unreasonable, because toll is given as a compensation for the use of the road; and that the plaintiff had a right to use this part of the road before without paying toll, and gains nothing by the payment of the toll, because that toll could not be laid out in its improvement. But it is obvious that the first part of this objection applies equally to the parts of the road repairable by parishes, townships, or individuals; and the latter pro-
ceeds

ceeds on an assumption which, as far as we are aware, is not founded upon any express provision in the act, that the trustees would violate their duty in laying out any portion of their funds upon this part of the road. It is true that they are not likely to be called upon to do so, because the county being in general provided with an ample fund, fulfils its obligation to repair completely and effectually; but if the reverse should happen to be the case, and the public exigency require it, we do not know that the trustees might not expend money in repairing this portion of the road.

And supposing it were otherwise, and that no part of their funds *could* be so laid out, it cannot be considered as *unreasonable* that a person who uses any part of a road, all of which is virtually repaired by the public, though in different modes, should pay something to the public in return.

It appears to us that there is nothing unreasonable in this construction; and there is certainly nothing inconsistent with the express or implied intention of the legislature, to be collected from other parts of the act. In our opinion no distinction can be made in respect of the obligation to pay toll, between the parts of the road which are repaired by parishes, townships, or individuals, and those which are repaired by the county; whatever the liabilities to repair may be, all are alike *parts of the road*.

The judgment of the Court below must therefore be affirmed.

Judgment affirmed.

1852.

BUSSEY
against
STORRY.

1832.

Monday,
Nov. 5th.STORR and Another *against* BOWLES.

The act for
uniformity of
process, 2 W. 4.
c. 39. s. 1., does
not prevent the
signing of a
pluries bill of
Middlesex in a
suit commenced
before the act
came into
operation.

5132. ad - 876

S. *HUGHES* moved that the signer of *Middlesex* writs might be ordered by the Court to sign a pluries bill of *Middlesex* in the above cause, which that officer had declined to do, considering himself precluded from it by the act for uniformity of process, 2 W. 4. c. 39. In sect. 1. of the act (which came into operation the first day of this term), after reciting that the process for the commencement of personal actions in the superior Courts is inconvenient, it is enacted, "that the process in all such actions commenced in either of the said Courts," where it is not intended to hold to bail, shall be in the form after stated, namely, by writ of summons. But the writ of summons, by its form, applies only to the original commencement of an action, which in this case would have been too late to save the statute of limitations; the object of this application therefore was, that the plaintiff might have the benefit of the former process, which was sued out within the six years, and would be continued by the pluries bill of *Middlesex*.

Per Curiam. We are of opinion that the clause applies only to actions commenced since the statute came into operation. It will probably be sufficient to give this intimation, for the guidance of the officer.

1832.

STURCH *against* CLARKE and Two Others.Monday,
Nov. 5th.

CASE for wrongfully and maliciously taking and distraining goods of the plaintiff, as a distress for 141*l.* for a poor rate alleged and pretended to have been duly assessed on him, and to be in arrear, such goods being of much greater value than 141*l.*, to wit, 700*l.*, whereby the defendants then and there took a great, unreasonable, and excessive distress for the said 141*l.*, &c., and wrongfully and maliciously detained the same, to wit, for three days, and until the plaintiff was obliged to redeem the same by paying 141*l.* and costs; whereas one fourth part of the distress would have been sufficient to satisfy the said 141*l.* and charges, &c. Plea, the general issue. At the trial before *Gaselee J.*, at the *Buckinghamshire* Summer assizes 1832, it appeared that the distress (consisting of sheep and rams, and a quantity of beans,) was taken under a warrant issued by two justices to the overseers of the parish of *Haddenham, Bucks*, reciting that the plaintiff had been assessed to the poor rate in the sum of 141*l.*, and had refused payment, &c., and requiring them to make distress of the plaintiff's goods and chattels; and if the sum, with costs, &c., were not paid in five days, to sell the said goods and chattels, and retain the amount, rendering the overplus to the plaintiff. The defendants, two of

Plaintiff de-^{121*l.* 273}clared in case, ^{11 *a + l.* 783}that the defendants wrongfully and maliciously took his goods of the value of 700*l.* as a distress for 141*l.* alleged and pretended to be due for a poor rate, whereby they levied an unreasonable and excessive distress for the said 141*l.*; and it was proved that the defendants, overseers, having a regular distress warrant for the rate, distrained cattle, &c. of the plaintiff, to the value of more than 600*l.*:

Held, that the plaintiff was not bound to demand a copy of the warrant, pursuant to 24 G. 2. c. 44. s. 6. before commencing his action, as the overseers had not acted in obedience to the warrant, and no action

would have lain against the justices.

Held further, that it was not a question to be left to the jury on these facts, whether or not the defendants acted maliciously.

And, on motion in arrest of judgment, held, that the declaration, though it did not expressly admit any poor rate to have been due (on which ground it was objected that the action ought to have been trespass), was sufficient, at least after verdict.

1832.

 STURCH
 against
 CLARKE.

whom were the overseers, and the third an auctioneer employed by them, distrained goods which were valued by a witness for the plaintiff at 642*l*. The plaintiff obtained a verdict for 10*l*.

Biggs Andrews now moved for a rule to shew cause why the judgment should not be arrested, or a new trial had, or (by leave reserved) why a nonsuit should not be entered. The objection in arrest of judgment was, that the declaration did not (according to the precedents in such cases) admit that *something* was due. If nothing was due, the action should have been in trespass. The ground for a new trial was, that the learned Judge did not leave it to the jury whether or not there was malice. *Express* malice need not be proved, but some evidence of it ought to appear. [*Parke J.* There was no need to shew malice if it appeared that a more than reasonable distress was taken (*a*).] As to entering a nonsuit, the parties here acted in obedience to a warrant of justices, and the plaintiff never demanded a perusal and copy of the warrant, according to 24 G.2. c. 44. s. 6. (*b*) No action, therefore, could be maintained. The law is the same even if the warrant was illegal. *Price v. Messenger* (*c*).

PARKE J. The object of the statute in making a demand of the warrant necessary is, that the justice may be joined as a defendant. But this is an action for seizing goods more than reasonably sufficient for the

(a) See *Field v. Mitchell*, 6 *Esp.* 71.

(b) Overseers distraining for poor's rate are within the statute, *Harper v. Carr*, 7 *T. R.* 270.

(c) 2 *B. & P.* 158.

probable

probable exigency of the distress-warrant; an excess for which the justices could not possibly have been made joint defendants. In such a case the act does not apply. *Bell v. Oakley* (a) decides this, and it is apparent from the terms of the act. *Milton v. Green* (b) shews the distinction between cases in which the magistrate may be joined as a wrong-doer, and those in which the warrant is regular, but the officer has exceeded the authority given by it. *Price v. Messenger* (c), and all the modern cases on the subject, shew that where demand of a copy of the warrant is held necessary, it is upon the ground that the officer acted in obedience to it. As to the first objection, the effect of the declaration is, that whether 141 $\frac{1}{2}$ were due or not, more was taken by the defendants than was in fact due. I think it is sufficient, at least in this stage of the proceedings.

1832.

 STURCH
against
CLARKE.

TAUNTON J. I am of the same opinion. It seems to me that the term "*excessive*" implies that some poor rate was due. A copy of the warrant would have been of no use, where no proceeding could be taken against the justices.

PATTESON J. I am of the same opinion. In *Branscomb v. Bridges* (d), where the plaintiff's goods were distrained for rent, the whole having been tendered, and there having been no subsequent demand and refusal, it was held that, if trespass would lie, still the plaintiff might waive the trespass and declare in case

10 Bing. 15

(a) 2 M. & S. 259.

(b) 5 East, 238.

(c) 2 B. & P. 158.

(d) 1 B. & C. 145.

1832.

 STURCH
 against
 CLARKE.

for an excessive distress. At all events, I think the present declaration is good on motion in arrest of judgment, whatever might have been the result on special demurrer.

Rule refused (a).

(a) As to demand of a copy of the warrant, see *Kay v. Grover*, 7 Bing. 312., and the cases there cited.

Monday,
 Nov. 5th.

WRIGHT *against* BRUISTER.

A toll of one penny for every pig brought into a market is not necessarily unreasonable.

3 Bac. 556.

ASSUMPSIT for tolls. Plea, the general issue. At the trial before Lord *Tenterden* C. J., at the last assizes for the county of *Hertford*, the following appeared to be the facts of the case. The plaintiff claimed a toll of a penny for every pig brought into *Bishop Stortford Market*, by virtue of a lease granted by the Bishop of *London*, the lord of that manor. In support of the right, he gave evidence that a toll of a penny per pig, for every pig brought into the market, had been taken in *Bishop Stortford* for a long series of years. It was objected, that such a toll was unreasonable. Lord *Tenterden* reserved the point, and told the jury to find for the plaintiff, if they thought from the evidence that the toll in question had been usually paid by persons frequenting the market. The jury having found for the plaintiff,

Law now moved, according to the leave reserved, to enter a verdict for the defendant. Whether toll be reasonable or not, is a question of law, 2 *Inst.* 222. Here the plaintiff relied not upon a grant of toll, but on

1832.

 WRIGHT
 against
 BRULSTER.

on a prescriptive right to toll, to be inferred from the receipt of it for a long series of years. At the time of its presumed commencement (in the reign of *Richard I.*), one penny would have been a very unreasonable toll. In *Heddey v. Welhouse* (a) it is said that, in the argument of the case, the justices held that the king might grant a toll with a new fair, if the toll were reasonable and not excessive; but one penny per beast they held unreasonable.

PARKE J. I think there should be no rule in this case. The jury having found that this toll had been usually taken, it is the duty of the Court to support it, unless it be unreasonable; and the onus of shewing it to be unreasonable is on the defendant. He relies on the case of *Heddey v. Welhouse*, as reported in *Moore*, where it is said that the justices held, during the argument, that a penny per beast was an unreasonable toll. The case seems to be more correctly reported in *Cro. Eliz.* 558., and there it does not appear that the Judges so decided. *Popham J.*, on the contrary, seems to have thought such a toll to be reasonable. He says, "The king may grant a fair, and that toll shall be paid, although it be a charge upon the subject; because his subjects, viz. the vendees, have benefit and ease by such fairs: but the king cannot appoint a burthensome toll; but it ought to be a petit sum, as a penny or two-pence, which are the smallest coins, or of lesser; but not of any greater value to charge the subject." We do not know when the toll in this case commenced; and we cannot say that a toll of a penny per pig, which

(a) *Moore*, 474.

1832.

WRIGHT
against
BRAISTER.

has been taken for many years, is necessarily unreasonable: and I think the defendant has failed in shewing that it is so.

TAUNTON J. I cannot say that a toll of one penny per pig is, in point of law, unreasonable.

PATTESON J. The jury having found that the toll has been paid for such a considerable period by persons frequenting the market, I think it is too much for us to say that, in point of law, it is unreasonable.

Rule refused.

Monday,
Nov. 5th.

HUTCHINSON *against* W. LOWNDES, T. HALL,
J. RADFORD, and S. BROAD.

5 - 529 The 5 G. 4.
530 c. 18. s. 2. re-
citing that, by
some acts,
penalties or
sums of money
are to be re-
covered before
a justice, and
he is authorized
to issue his war-
rant for levying
the same by
distress, but
no further re-
medy is pro-
vided in case

THIS was an action for assault and false imprisonment. Plea, not guilty. At the trial before Lord *Lyndhurst* C. B., at the *Chester* Summer assizes 1832, the following facts appeared. The two first named defendants were magistrates for the borough of *Congleton*, the defendant *Radford* was a constable, and *Broad* a gaoler of the same borough. On the 23d of *May* 1831, one *J. Cotterill*, a labourer, obtained from the defendant, *Hall*, a summons against the plaintiff, for wages on ac-

no sufficient goods can be found, enacts, that whenever it shall appear to such justice that the party has not sufficient goods whereon to levy, it shall be lawful for such justice to issue forth his warrant for committing such offender to the common gaol for any term not exceeding three calendar months, unless the sum adjudged to be paid, and costs, shall be sooner paid: provided always, that the amount of such costs shall be specified in such warrant of commitment:

Held, that the warrant of commitment must be in writing; and that the detention of the party without such written warrant cannot be justified for any longer time than is necessary for making it out.

count

count of work done by *Cotterill* for the plaintiff in *Congleton*; and in the evening of that day *Cotterill* and the plaintiff attended the defendants *Lowndes* and *Hall*; and *Cotterill* swore that the sum of 1*l.* 4*s.* 6*d.* was due to him from the plaintiff, for wages which he had refused to pay. The defendant *Lowndes* then ordered the plaintiff, verbally, to pay *Cotterill* the 1*l.* 4*s.* 6*d.*, and 2*s.* 6*d.* for the costs of summons, &c.; but the plaintiff refused. He was then asked if he had any goods on which the sums might be levied, and he said he had not. And he was thereupon (without a previous warrant of distress being issued) committed verbally to the common gaol of the borough of *Congleton*, for one calendar month, unless the wages and costs were sooner paid, and was at once taken to the prison by the defendants, *Broad* and *Radford*, where he remained from the evening of the 23d to the morning of the 25th of *May*; he then paid the wages and costs, and was discharged. On the 31st of *May* 1831, a copy of the warrant of commitment was demanded from the two constables, and such copy was delivered to the plaintiff's attorney on the 4th of *June*. The summons for payment of the wages and costs, and the warrant of commitment of the plaintiff in default of payment, were both dated the 23d of *May* 1831 (the day when the complaint was heard), but were reduced into writing, and signed by the defendant *Lowndes*, after the 31st of *May*. The warrant of commitment having been merely verbal at the time when the plaintiff was sent to gaol, an objection was taken, that the commitment was illegal; and the learned Judge, being of that opinion, directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit.

1832.

 HUTCHINSON
 against
 LOWNDES.

1832.

HUTCHINSON
against
LOWNDES.

Cottingham now moved accordingly. The justices have not exceeded the authority given them by the acts of parliament relating to this subject. By the 20 G. 2. c. 19. (extended so as to include cases of this description by 31 G. 2. c. 11. s. 3.), a justice or justices are empowered, upon complaint by any servant or workman there mentioned, on oath, to make an order for the payment of wages, and to enforce the same, if not complied with by the master within twenty-one days, by warrant of distress. By 4 G. 4. c. 34. s. 5., referring to the above statutes, such order is declared to be final. And by 5 G. 4. c. 18. s. 2. it is enacted, that in case it should appear, by the confession of the party, that he has not sufficient goods whereon a distress can be levied, "such justice or justices may issue forth his or their warrant for committing such offender to the common gaol, for any term not exceeding three months, unless the sum adjudged to be paid, and all costs and charges of the proceedings, shall be sooner paid: provided always, that the amount of such costs and expences shall be specified in such warrant of commitment." All the requisites contained in the acts of parliament were strictly complied with. It is true, there was no commitment in writing made out at the time when the plaintiff was taken to prison; but it was not necessary that the warrant should be made out at that precise moment, the doing of which, in many cases, would be impossible. It is sufficient if a commitment be made out within a reasonable time, so as to afford the party complaining, after having called for the proceedings, the means of proving any irregularity therein. The objection is one *strictissimi juris*, and not to be favoured. In the case of
a con-

a conviction, *Abbott C. J.*, in *Basten v. Carew* (a), states it to be a general rule and principle of law, "that where justices of the peace have an authority given to them by an act of parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required by the act to do, in order to originate their jurisdiction, a conviction drawn up in due form and remaining in force, is a protection in any action brought against them for the act so done." Justices may draw up convictions, not only after the penalty is levied, but even after action brought, *Massey v. Johnson* (b), *Gray v. Cookson* (c): and may even alter such a conviction, after a certiorari has issued to remove it into this Court, *Rex v. Barker* (d), *Rex v. Allen* (e).

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HUTCHINSON
against
LOWNDES.

PARKE J. The statute 5 G. 4. c. 18. s. 2. enacts, that in the case there specified "it shall be lawful for the justices to issue a warrant for committing such offender." That must mean a warrant in writing, for the amount of costs and expenses is to be specified in the commitment. In *Hawkins P. C.* book 2. c. 16. s. 13., it is said that a commitment must be in writing, under the hand and seal of the person by whom it is made, and expressing his office or authority, and the time and place at which it is made, &c. It is true it need not be immediately made out; the detention of the party during the time necessarily required to make it out would be justifiable, but it should be as soon as possible. Here several days elapsed. A commitment is in no respect like a conviction. That is only the

(a) 3 B. & C. 652.

(b) 12 East, 67.

(c) 16 East, 15.

(d) 1 East, 186.

(e) 15 East, 343.

entering

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against
LOWNDES.

entering on parchment the proceedings of the Court which have already taken place: it is like recording a judgment in a superior court. But if a justice may imprison without a commitment in writing, it may as well be said that a sheriff may seize the goods of a defendant before the fieri facias be made out.

TAUNTON J. I am of the same opinion. The commitment is not mere matter of form. By not having the causes of his commitment duly stated, the party imprisoned is, for the time, deprived of the benefit of a writ of habeas corpus.

PATTESON J. The second section of 5 G. 4. c. 18. authorizes justices to issue a warrant. That manifestly means a warrant in writing. I cannot think that the warrant may be made at any time. The statute does not say in express terms that the warrant shall be in writing, but it does so in effect, for the amount of costs and expenses is to be specified in the commitment.

Rule refused.

Tuesday,
Nov. 6th.

WRAY, Assignee of CATTON, *against* The Earl of EGREMONT.

8 M. & W. 734 By the insolvent act 7 G. 4. c. 57. s. 3i. no distress for rent made and levied after the arrest of any person who shall petition the court for the relief of insolvent debtors for his discharge, upon the goods or effects of such person, shall be available for more than one year's rent. A distress taken before, but not sold till after the arrest of such insolvent debtor, is available for more than a year's rent.

Infra. 255.

county

county of *York*, it appeared that the insolvent had for some years been tenant of a farm to the defendant, at a rent of 115*l.* payable half yearly, and that, the rent for two years and a half being in arrear at *Lady Day* 1831, the defendant on the 29th of *August* in that year distrained for the same. On the 30th of *August*, *Catton* was arrested by the plaintiff for a debt of 150*l.*; he was committed to *York* gaol, and signed a petition to the court for the relief of insolvent debtors, pursuant to the statute 7 G. 4. c. 57.; and, on the 3d day of *September*, gave notice of his having done so to the defendant's agent, and required him not to sell for more than a year's rent. The goods were sold, under the distress, on the 5th of *September*, and produced 200*l.* 19*s.*, and there remained in the defendant's hands, after deducting thereout the expenses of sale and one year's rent, the sum of 74*l.*, to recover which the present action was brought. The learned Judge was of opinion that the defendant was entitled to retain the whole sum, inasmuch as the distress had been made before the arrest; and he nonsuited the plaintiff.

Campbell now moved to set aside the nonsuit. The 7 G. 4. c. 57. s. 31. (a) enacts; that no distress for rent made and levied upon the goods of an insolvent, after his arrest, shall be available for more than one year's rent. The words "made and levied" are in the corre-

(a) Sect. 31. enacts, "That no distress for rent, made and levied after the arrest or other commencement of the imprisonment of any person who shall petition the said court for his discharge from such imprisonment, according to this act, upon the goods or effects of any such person, shall be available for more than one year's rent accrued prior to the execution of the conveyance and assignment by such person in pursuance of this act, but that the landlord or party to whom the rent shall be due, shall and may be a creditor for the overplus of the rent due, and for which the distress shall not be available, and entitled to all the provisions made for creditors by this act."

sponding

1832.

WRAY
against
The Earl of
EGREMONT.

1832.

WRAY
against
The Earl of
EGREMONT.

sponding clause of the bankrupt act, 6 G.4. c. 16. s. 74. Here the distress was made before, but not levied till after, the arrest of the insolvent. Now a distress is *made* as soon as the bailiff enters on the premises, but it is not *levied* until a sale takes place, and the property in the goods remains in the tenant till sale, though as soon as they are seized they are a security to the landlord for his rent, and continue so until the sale. So, a person who had issued a *fi. fa.*, under which the sheriff had seized, but not sold, when the debtor became bankrupt, has been held to be a creditor having security for his debt within the meaning of 6 G. 4. c. 16. s. 108., and not entitled to the proceeds on a subsequent sale by the sheriff(a). Now an execution gives an immediate right to sell; a distress gives a right to sell only at the end of five days. The goods, therefore, continued the property of the insolvent, when he made the assignment to the plaintiff; and the latter is entitled to recover.

PARKE J. At common law, the landlord was entitled to sell the goods of the tenant for all the rent due. That right can only be cut down by the statute. It enacts, that no distress *made and levied* after the arrest shall be available for more than a year's rent. Here the distress was *made* before the arrest of the insolvent debtor. It is not a case, then, within the words of the act. The common law right, therefore, of the landlord, is not affected by it, and he was entitled to sell the goods distrained, to a sufficient amount to satisfy the whole rent.

TAUNTON J. I think the opinion delivered by the learned Judge at the trial was correct. The statute says, that no distress made and levied after the arrest, &c.

(a) *Nolley v. Buck*, 8 B. & C. 160.

shall

shall be available for more than a year's rent. To bring a case within that provision, the distress must be made after the arrest. Here it was made before the arrest of the insolvent: and if it was once rightfully made, this is analogous to the case of an execution issued before an act of bankruptcy, on a judgment obtained in the ordinary way; and in such case, if the goods be seized before the act of bankruptcy, the execution may be completed by the sale of goods afterwards; though in the case of a judgment by default, confession or *nil dicit*, it would be otherwise, but that is by reason of an express provision by statute. So, here, the distress having been made before the arrest, the landlord was entitled to sell afterwards.

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against
The Earl of
EGREMONT.

PATTESON J. The statute applies to cases where the distress is made and levied after arrest of the insolvent. Here it was made before. I doubt whether the word *levied* has, in this statute, any meaning different from the word *made*. The 21 *Jac.* 1. c. 19. s. 9. enacts, "that all creditors having security for their debts by judgment, &c., whereof there is no execution or extent served and executed upon any of the lands, &c. of the bankrupt, before he shall become bankrupt, shall not be relieved upon any such judgment, &c., for more than a rateable part of their debts, &c. with the other creditors of the bankrupt." Now it has been held that the words *served* and *executed* have the same meaning; and that an execution commenced by seizure before, but not finished till after, the act of bankruptcy is committed, was *served and executed* within the meaning of the statute (a).

Rule refused.

(a) See *Philips v. Thomson*, 3 *Lev.* 192., and *Giles v. Grover*, 6 *Bingh.* 140.

1832.

Tuesday,
Nov. 6th.

DOE dem. MARGARET and JANE DALTON *against*
JONES and Another.

A private dwelling-house was demised for forty years, by lease, containing a covenant to repair and keep in repair the premises, and all such buildings, improvements, and additions as should be made thereupon by the lessee during the term, with a proviso for re-entry in case of breach of covenant.

The lessee changed the lower windows into shop windows, and stopped up a doorway, making a new one in a different place, in the internal partition of the house :

Held, that no forfeiture was incurred, the lessee's covenant being only against *non-repair*, and it being implied, by the terms of the lease, that additions and improvements were to be made.

4 Bac. 884.

EJECTMENT for premises at *Swansea*. At the trial before *Alderson J.*, at the last Summer assizes for *Glamorganshire*, it appeared that this action was grounded on a forfeiture, said to be incurred by breach of covenant in a lease. The premises, a dwelling-house, garden, &c. were demised to the defendant, *Jones*, for forty years from *Lady Day* 1819, at a rent of 30*l.*, which the lessee covenanted to pay, and also to 'repair and keep repaired, &c. the messuage, garden, and premises, by the indenture of lease demised, "together with such buildings, improvements, and additions whatsoever, as at any time during the said term should be erected, set up, or made by him, the said *Thomas Jones*, his executors, &c. thereupon;" that it should be lawful for the lessor (under whom the lessors of the plaintiff claimed) to enter and view the premises; and that in case any defects or want of reparation of the said premises or any part thereof should be there found, the defendant, his executors, &c. should, on notice thereof in writing, cause the said premises to be forthwith well and substantially repaired or amended in all things. The only other covenants on the lessee's part were, not to assign without license, and to deliver up the premises at the expiration of the term, in good, substantial, and tenantable repair and condition. Proviso for immediate re-entry, if the rent should be unpaid for twenty-one days, or if the lessee should not observe and perform all his covenants. Until

January

January 1832, the house was private, and occupied as a lodging-house. The defendant, *Jones*, then took down part of the house-front, next the street, and converted the lower portion of the premises on that side into a shop, and exhibition room for pictures. The old windows, which were of the form usual in private houses of that description, and about four feet six inches wide, and five feet high, were taken away, and shop windows put in, measuring about eight feet in width by six in height. On the inside, a partition on the ground-floor was broken through, a new door made in it, and an old one stopped up. The work was done well, and with good materials. Notice in writing was given to the plaintiff, during these proceedings (but not attended to by him), to repair, and not to alter the premises. *Alderson J.* was of opinion, that no breach of covenant was proved, and directed a nonsuit, but gave leave to move that a verdict might be entered for the plaintiff.

1832.

 Doe dem.
 DALTON
 against
 JONES.

Whitcombe now moved accordingly. The alterations made by the defendant were a breach of the covenant to repair, *Doe dem. Vickery v. Jackson (a)*. [*Patteson J.* In that case the door was made, not in an internal partition, but in a wall between two houses. *Parke J.* The covenant relied upon here, contemplates the making of improvements.] But not altering the whole character of the premises. The improvements must be considered with reference to the nature of that which is the subject matter. It cannot have been the meaning of the parties, that a private house should be turned into a shop. [*Parke J.* If the defendant had sold goods on the

(a) 2 Stark. N. P. 293.

premises,

1832.
 ———
 DOX dem.
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premises, that would not have been a breach of any covenant; the only question therefore is, whether a forfeiture be incurred, under this lease, by merely enlarging the windows and opening a new door in the house.] The parties cannot have contemplated as an improvement, the doing of acts which the law considers waste. In *Vin. Abr. Waste*, D. pl. 19., it is said, that “If a lessee flings down a wall between a parlour and a chamber, by which he makes the parlour more large, it is waste, because it cannot be intended for the benefit of the lessor, nor is it in the power of the lessee to transpose the house (a).”

PARKE J. That does not apply to a lease like this, which contemplates “improvements and additions,” and only provides against non-repair, which is *permissive* waste. Under such a lease can it be said that a valuable house was to be kept in precisely the same condition for forty years? I think the nonsuit was right.

TAUNTON J. I am of the same opinion. This case is the same as if there had been an express contract for the liberty to make improvements, which at common law would have been waste: here the contract is implied. There is no stipulation against waste, except by the covenant to repair: and I am clearly of opinion that enlarging the windows and opening a door, as here proved, did not amount to a breach of that covenant, the effect of which was merely that the tenant should supply the ordinary wear and tear of the premises.

(a) Cited from *Keilwey*, 37 b., where a former decision of this point, in the same case, is referred to, *Yearb.* 10 H. 7. f. 2.; but a distinction is there taken as to a *partition*.

PATTESON

PATTESON J. This was nothing more than the ordinary covenant to repair; I think no forfeiture was incurred under the lease.

Rule refused.

1832.

DOX dem.
DALTON
against
JONES.

BUTCHER and Another *against* HARRISON and Another.

Tuesday,
Nov. 6th.

DEBT by the plaintiffs as assignees, under the insolvent act, of the defendant *Harrison's* estate. The declaration stated that the defendant, *Anna Louisa Harrison*, was entitled to and interested in certain lands, &c. of the yearly value of, &c. and was indebted to the plaintiff, *Butcher*, in the sum of 30*l.*, and to other persons in divers other sums; nevertheless, that the defendants well knowing the premises, of their malice, fraud, &c., were parties to a fraudulent conveyance of the said lands, &c. from the said *A. L. H.* to *Edward Harrold* (the other defendant) by lease and release, for a pretended consideration of 500*l.* in the said conveyance stated to have been paid, to the intent to hinder and defraud *A. L. H.'s* creditors of their just debts; which conveyance the defendants, after the said *A. L. H.* became an insolvent debtor, did wittingly and willingly put in ure, avow, maintain, &c. to the intent before stated, contrary to the statute; whereby an action had accrued to the plaintiffs as such assignees, (being, as such assignees as aforesaid, *the parties grieved* by the said fraudulent conveyance,) to demand and have, for the king and for themselves as such assignees, &c. of and from the defendants, being the parties thereto, one year's value of the lands, amounting to, &c., "and also

The assignees of an insolvent debtor are "parties grieved," within the meaning of the act 13 *Eliz. c. 5.* against fraudulent conveyances, and may recover the penalty thereby given, from the insolvent and others, parties to such conveyance.

On a fraudulent alienation of lands, the offending parties forfeit (by sect. 3. of the act), a year's value of the estate, but not the consideration money named in the conveyance.

3 Nov. 781.

1832.

—
 BUTCHER
 against
 HARRISON.

the said sum of 500l., being the said sum of money contained in the said conveyance as aforesaid." Plea, nil debent. At the trial before *Bosanquet J.*, at the *Stafford Summer assizes 1832*, evidence was given in support of the averments in the declaration, and the plaintiffs had a verdict for 150*l.* as the annual value of the land, and 500*l.* as the sum contained in the conveyance.

Curwood now moved for a rule to shew cause why a nonsuit should not be entered, or the judgment arrested. This is a declaration on the statute 13 *Eliz. c. 5. (a)*, for a penalty in respect of a fraudulent conveyance; and the plaintiffs say that they claim, being, as assignees of an insolvent, by whom the conveyance was made, "the parties grieved" thereby. But assignees of an insolvent who has made such a conveyance, are not "grieved" thereby, within the meaning of the act: they cannot, as representatives of one party to such conveyance, sue the other for penalties. And further, the forfeiture given by the act is, "one year's value of the said lands," &c.,

(a) The act is stated in sect. 1. to be for the avoiding of fraudulent conveyances, &c. as well of lands as of goods, devised and contrived to delay, hinder, or defraud creditors and others of their lawful actions, debts, &c. It is therefore enacted in sect. 2. that all and every bargain and conveyance of lands, goods, and chattels, &c. and all and every bond made to or for any intent or purpose before declared, shall be, (only as against the persons thereby hindered, delayed, and defrauded,) utterly void. And sect. 3. enacts, that the parties to such fraudulent conveyance, bonds, &c. who at any time after &c. shall wittingly and willingly put in ure, avow, maintain, justify, or defend the same as true or made *bonâ fide*, "shall incur the penalty and forfeiture of one year's value of the said lands, tenements, and hereditaments, leases, rents, commons, or other profits, of or out of the same; and the whole value of the said goods and chattels; and also so much money as are or shall be contained in any such covinous and feigned bond;" one moiety to the Queen, the other "to the party or parties grieved" by such fraudulent conveyance, bond, &c.

"and

“and the whole value of the said goods and chattels; and also so much money as are or shall be contained in any such covinous and feigned bond;” that is, where land is fraudulently conveyed, one year’s value of the land shall be forfeited; where goods, the value of the goods; and where a bond is given, the sum of money named in the bond: but here the plaintiffs have claimed in their declaration, and have recovered, both a year’s value of the land and also the consideration money mentioned in the deed of lease and release. They were only entitled to 150%.

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Per Curiam (a). We have no doubt that the assignees were parties grieved within the statute, being the persons who, but for the fraudulent conveyance, would have been entitled to seize the lands by due process of law. As to the other point, the act declares that the money contained in any such covinous and feigned bond shall be forfeited, but not the consideration named in any fraudulent conveyance. There will, therefore, be a rule to shew cause why the damages should not be reduced to 150%. But,

R. V. Richards, for the plaintiffs, consenting, the rule for such reduction was forthwith made

Absolute.

(a) *Parks, Taunton, and Patterson Js.*

1832.

Wednesday,
Nov. 7th.

EDWARD LYTTON BULWER, Esquire, *against*
HORNE, COSTAR, and Others.

In assumpsit on a special contract, and for money had and received, &c. defendant pleaded the general issue, and to the common counts a tender; and he paid money into Court, upon a rule in the common form, not applying in terms to any particular count: Held, that such payment could not be referred exclusively to the counts as to which a tender was pleaded, but that it applied to the whole declaration, and admitted the special contract.

ind Pl. 49 v. 680

ASSUMPSIT against the defendants, carriers, for not conveying the plaintiff to *Cheltenham* according to an agreement which was specially stated. Money counts. Plea, the general issue, except as to 1*l.*, part of the sums claimed in the third and subsequent counts (the common counts), and as to that a tender. Issue thereon. At the trial before *Parke J.*, at the sittings at *Westminster* during last *Hilary* term, it appeared that the plaintiff had paid a deposit of 1*l.* for a place in the mail to *Cheltenham*, the defendants engaging, as they said conditionally, but as the plaintiff alleged absolutely, to convey him: at the time appointed the mail was full, and the plaintiff proceeded in a chaise and brought this action to recover the expenses. The jury were of opinion that the contract was conditional only, but it appeared that the defendants, on pleading a tender, had, by mistake, obtained a rule of Court in the common form, for paying 1*l.* into Court generally, and not upon the particular counts to which the tender was pleaded; and the money was so paid in. No entry of payment was made on the margin of the paper-book. It was contended for the plaintiff that this general payment must be considered an admission of the special contract stated in the first two counts; and *Parke J.*, being of that opinion, directed a verdict for the plaintiff for 5*l.*, giving leave to move that a nonsuit might be entered. A rule nisi having been obtained for that purpose,

F. Pollock

F. Pollock and *Hoggins* now shewed cause. The learned Judge decided rightly, and when a mistake like this is made, the party must abide by the consequences. It has been so held in a case where money was erroneously paid into Court on a declaration upon a policy of insurance (a).

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 BULWER
 against
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Sir *James Scarlett* and *Curwood* contra. The payment into Court upon this rule was not a conclusive admission, but capable of being explained. It is true that such payment under a rule of Court in an ordinary case where the general issue is pleaded, is a conclusive admission that something is due, and that an action lies on every count. But on a plea of tender that is not so. The plea states that the party, at a certain time, tendered a part of the sum claimed in certain counts of the declaration, and has ever since been and still is ready to pay it, and that he now brings it into Court ready for the plaintiff if he will accept it. In support of this last averment the money is paid in, and the rule of Court is the evidence of the payment. If the 1*l*. were not paid, the defendant must fail on that plea. The general inference, therefore, does not arise, as in other cases, that the payment applies equally to the whole declaration. The plaintiff cannot understand it so, and such a construction would be contradictory to the record. There is no case in which it has been adopted. To make the payment here applicable to

(a) Alluding probably to *Andrews v. Palsgrave*, 9 *East*, 325. The defendant there obtained leave to amend his rule for paying money into Court, and to go to a new trial on payment of costs; but in the present case no application of that kind could be made, the damages being below 20*l*.

1832.

BULWER
against
HORNE.

the whole declaration, 1*l*. ought to have been paid in upon the counts to which the tender is pleaded, and another like sum on the remaining ones.

PARKE J. I have always understood that payment of money on a rule of Court was deemed a conclusive admission. I yield to the objection with reluctance, but I think we must decide that money paid in as this was, is paid upon the special as well as the general counts, and has the effect of an admission on both. It is said this was a mistake; but the defendant might have availed himself of it if he had failed on the plea of tender; for, in that case, if the plaintiff had only proved a loss of 1*l*. incurred by him through the default complained of, the defendant would have had a verdict, and his costs subsequent to the bringing of the money into Court. As, then, he would have benefited by the error in that case, he must suffer by it in the event which has occurred.

TAUNTON J. concurred.

PATTESON J. I am of the same opinion, though I come to the conclusion reluctantly. This is clearly a blunder, but the party making it must suffer the consequence.

Rule discharged.

1832.

The KING *against* LLOYD, BURNELL, and
Others.

Thursday,
Nov. 8th.

AN indictment against these parties for conspiracy, being removed by certiorari, was tried at the last *York* assizes, on the civil side, before *Parke J.* The defendants, *Lloyd* and *Burnell*, were convicted and sentenced, at the same assizes, to eighteen months' imprisonment. *John Williams* (with whom was *Alexander*) now moved for a new trial, on the ground that the verdict was against evidence. The Court having refused a rule nisi, *Williams* then moved for a rule to shew cause why the sentence should not be amended, pursuant to the statute 11 G. 4. and 1 W. 4. c. 70. s. 9. (a), by diminishing the punishment. In support of this motion affidavits, sworn by the defendants respectively, were put in and read, vindicating their conduct on the merits of the case; stating hardships to which they had been

By the act 11 G. 4. & 1 W. 4. c. 70. s. 9. upon trials for felony or misdemeanor on a King's Bench record, judgment may be pronounced at the assizes, and shall have the effect of a judgment of the court above, unless that court in the first six days of term grant a rule nisi for a new trial, or for amending the judgment.

A defendant on such record, having been sentenced at the assizes, cannot apply to the Court to amend the judgment by diminishing the punishment, upon ordinary affidavits in mitigation, or without shewing some specific defect in the sentence, or some matter which could not have been adduced at the assizes.

(a) Which enacts, "That upon all trials for felonies or misdemeanors upon any record of the Court of King's Bench, judgment may be pronounced during the sittings or assizes, by the Judge before whom the verdict shall be taken, as well upon the person who shall have suffered judgment by default or confession upon the same record, as upon those who shall be tried and convicted, whether such persons be present or not in Court, excepting only where the prosecution shall be by information filed by leave of the Court of King's Bench, or such cases of informations filed by his Majesty's Attorney General, wherein the Attorney General shall pray that the judgment may be postponed; and the judgment so pronounced shall be indorsed upon the record of Nisi Prius, and afterwards entered upon the record in Court, and shall be of the same force and effect as a judgment of the Court, unless the Court shall, within six days after the commencement of the ensuing term, grant a rule to shew cause why a new trial should not be had or the judgment amended."

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—
The King
against
LLOYD.

subjected by the prosecution, and alleging ill-health, poverty, and the condition of their families, as grounds for a mitigation of the sentence.

DENMAN C. J. These affidavits do not shew any thing which would have been likely to induce a judge at the assizes to pass a milder sentence. And it is important it should be understood, that defendants are not enabled by this statute to take the chance of a light sentence at the assizes, and afterwards, if they think proper, come to this court to amend the judgment.

PARKE J. I am of the same opinion. The affidavits are not such as would have induced me to pass a lighter judgment. To ground a motion of this kind, the party ought to point out some essential defect in the sentence otherwise we should lose, and not gain, by the enactment of the late statute: for after sentence had been passed at the assizes, we should still be called upon, in a number of cases, to hear the report of the trial, affidavits, and speeches of counsel, in this court, as the practice was before the act.

TAUNTON J. concurred.

PATTESON J. It happens here that the affidavits contain nothing which could induce a mitigation of the sentence. But if this were otherwise, I think the parties would be bound to shew why they did not suggest that matter at the assizes.

Rule refused (a).

(a) As to the practice with respect to affidavits in mitigation at the assizes, see *Rex v. Cox*, 4 Car. & P. 540.

1832.
—DOE dem. THOMPSON *against* LEDIARD.Friday,
Nov. 9th.

EJECTMENT for toll-houses and toll-gates. At the trial before *Littledale J.*, at the *Gloucester* Spring assizes 1832, a verdict was found for the plaintiff with liberty to move to enter a nonsuit, and on such motion the Court directed a special case to be stated. The case was in substance as follows:—

By statute 6 G. 4. c. cxlvii., for improving part of the road from *Cheltenham* to *Gloucester*, &c., certain tolls thereby granted were made subject to the payment of monies borrowed on the credit of former tolls, and to be borrowed on the tolls granted by that act, without preference among the creditors in respect of priority of mortgages, &c. By statute 9 G. 4. c. ix., for making a branch road to communicate with the former, it was declared that the former act (except such parts as were then varied, altered, or repealed,) should be as valid and effectual for carrying this act into execution as if re-enacted therein; and certain tolls were granted on the branch road, to be applied like the former tolls, and were, by section 10., made liable to all the debts incurred on the credit of those tolls. By section 11. it was nevertheless provided as follows:—“ That all

By a local turnpike act certain tolls were made subject to the payment of monies borrowed and to be borrowed thereupon.

The trustees granted mortgages of such tolls, in the form given by the general turnpike act 3 G. 4. c. 126. s. 81. conveying to each creditor such proportion of the tolls, and the toll-gates and toll-houses, as the money advanced by him bore, or should bear to the whole sum due or to become due on that security.

By a subsequent act for making a new branch road, the former act was continued, and certain tolls were granted in respect of the

new branch, to be applied like the former, and to be subject to the debts incurred on the credit of the former tolls; and it was enacted, that all monies due on such credit should be entitled to “ a preference and priority of charge and payment ” before any monies advanced under this act, for making the new branch.

On ejectment for the tolls and toll-houses by the holder of a mortgage, (framed like the former ones,) for monies lent to complete the branch road: Held, that the words “ priority of charge,” did not prevent this mortgagee from acquiring a legal estate in the subjects mortgaged, and that he might recover the toll-houses and gates in ejectment, (pursuant to 3 G. 4. c. 126. s. 49.) only remaining accountable to the other mortgagees for such portion of the tolls as they were entitled to in respect of their advances.

such

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—
 DOR dem.
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such monies as are now due and owing on the credit of the said tolls, and also all such other monies as may hereafter be borrowed or raised for the making or completing the several branches of road authorized to be made by virtue of the said last-mentioned act (of 6 G. 4.), with the interest on all such monies respectively, shall have and be entitled to *a preference and priority of charge and payment*, to and before any sum or sums of money to be advanced by any person or persons on the credit of the tolls granted by the said last mentioned act or by this act, for the purpose of making or completing the new branch of road hereby authorized to be made as aforesaid, and for erecting a toll-gate and toll-house thereon, and to and before the interest on such last-mentioned sum or sums." This arrangement had been consented to before the passing of the act, by the lessor of the plaintiff, a person materially interested in the making of the branch road, and who, at the same time, agreed to advance money for the undertaking.

The branch road was made, and a toll-house and toll-gate erected thereupon, pursuant to the last-mentioned act; and the trustees under the two acts, having borrowed 2700*l.* of the lessor of the plaintiff, granted him, for the purpose of securing the same, twenty-seven mortgages, in the form given by the general turnpike act 3 G. 4. c. 126. s. 81., and in each of which the mortgagors (therein named as trustees for executing the two first-mentioned acts, the titles of which were recited), in consideration of 100*l.* advanced by him towards defraying the expense of the branch road, granted and assigned to him, his executors, &c., such proportion of the tolls arising and to arise on the said road, and the
 roads

roads authorized by the said acts to be made, and the toll-gates and toll-houses thereon, as 100*l.* did or should bear to the whole sum due or to become due on the security of the said tolls; to have, hold, and take the said proportion, &c. for and during the residue of the term for which the said tolls were granted, unless the said sum of 100*l.*, with 5 per cent. interest, were sooner paid. At the time of making these mortgages, there was and still is due to other creditors entitled to the preference given by 9 G. 4. c. ix. s. 11., the sum of 17,000*l.*, secured to them respectively by mortgages on the tolls, toll-houses, and toll-gates, in the same form as those held by the lessor of the plaintiff. The yearly income of the tolls is not sufficient to yield anything to the lessor of the plaintiff, after paying for necessary repairs, and the interest due to prior creditors. The defendant was at the date of the demise, and still is, in possession of the toll-gates and toll-houses. This case was now argued by

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Doc dem.
THOMPSON
against
LENIARD.

Maule for the lessor of the plaintiff. This action is well brought under section 49. (a) of the general turnpike act, 3 G. 4. c. 126, notwithstanding the preference given by 9 G. 4. c. ix. s. 11. to debts incurred on the

(a) By which, " If any mortgagee of tolls, toll-gates, &c. shall seek to obtain possession of the toll-gates, &c. in order to pay himself the principal money and interest, or any part thereof due to him, it shall be competent for him, as lessor of the plaintiff, and upon his demise only, and without uniting in such demise the other mortgagees of the said tolls and premises, to obtain such possession; but such person who shall obtain the possession thereof, shall not apply the tolls which may consequently be received by him, to his own exclusive use and benefit, but to and for the use and benefit of all the mortgagees of the said premises, *pari passu*, and in proportion to the several sums which may be due to them as such mortgagees."

credit

1832.

—
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 against
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credit of the former tolls, or for completing the branches of road mentioned in 6 G. 4. c. cxlvii. It is contended on the other side, that there is no legal estate in the lessor of the plaintiff, because the other creditors have a “priority of charge and payment:” but although they have a right to be first paid, that does not divest him of the legal estate conveyed to him by trustees under an act of parliament; he has a right to recover what is now claimed, and the application he may be bound to make of the tolls, after having so recovered, cannot alter his right: that is merely matter of account between him and the prior creditors. The same view was taken of a mortgage of tolls and toll-houses, upon which there were other mortgages, in *Doe dem. Banks v. Booth (a)*. It is true the eleventh section of 9 G. 4. c. ix. gives the creditors there mentioned a priority of “charge” and payment; but the word “charge” is satisfied by the application of the tolls, when recovered, to the payment of their mortgages first. If that were not so, the present lessor of the plaintiff could never recover, as long as a claim to any amount could be set up by one of the prior creditors. [*Parke J.* That is only the inconvenience to which any second mortgagee is liable.] The question is, whether the act places the lessor of the plaintiff in that situation.

W. J. Alexander, contra. If the lessor of the plaintiff could recover, a great hardship would be thrown upon the other mortgagees. The party who first lent his money on one of these mortgages acquired a legal estate in the whole tolls, toll-houses, &c. subject to two con-

(a) 2 B. & P. 219.

ditions:

ditions: first, the divesting of the estate on payment of the debt; secondly, the abstraction of a part of the security in favour of persons subsequently advancing money on similar mortgages. The value of the interest which such lender acquired, was to be calculated with reference to these events: but according to the claim now advanced on the other side, the act of 9 G. 4. c. ix. would entirely alter the result of this calculation. The eleventh section appears framed with a view to prevent any such assumption, for it retains to the creditors, who rank first, a priority of *charge* as well as of payment; the word *charge* evidently meaning the security they are to have, in addition to the right of being first paid: and the priority of charge is as important to them, as the preference given in respect of payment. Unless they had both, they would be subject to the very inconvenience suggested by Lord *Eldon* in *Doe dem. Banks v. Booth* (a). “The money advanced by the mortgagee would be very ill secured, if his only remedy was either an application to the vindictive power of the Court of King’s Bench, or a suit in Chancery, in which all the other mortgagees must be made parties.” The lessor of the plaintiff here is only mortgagee of the equity of redemption, and has no legal estate. The very form of his mortgage shews this, for it refers to the act 9 G. 4. c. ix., and thereby incorporates the eleventh clause as if it were in terms set out. Section 49. of the general turnpike act must not be understood to govern the proceedings on all mortgages which may thereafter be made; a new act, containing a specific provision like that of 9 G. 4. c. ix. s. 11., may control its operation.

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Doe dem.
THOMPSON
against
LEDAER.

(a) 2 B. & P. 224.

And

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—
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 TROSBROOK
 against
 LEDARD.

And in a mortgage made since that statute, whatever be its form, the demise (as was said in *Doe dem. Banks v. Booth* (a)), can only operate so as to effectuate the act. The word "charge," in this act, cannot be nullified or passed over, and must be taken to imply "legal estate."

Maule, in reply. A mere conveyance of the tolls and toll-gates, without more, would clearly have entitled the lessor of the plaintiff to the legal estate. Is that right altered because the act 9 G. 4. c. ix. adds some direction as to the purpose to which the tolls are to be applied when recovered? [*Patteson* J. At the time when the act passed, there was a legal estate outstanding in the other parties. *Parke* J. The legal estate was in them, subject to be opened by other mortgages granted to new creditors: the question is, whether, under the present act, it is so opened to the lessor of the plaintiff?] The mortgage to him is of all the tolls arising, and the toll-gates and houses erected, under both the local acts: the effect of the latter act was to throw the whole together, and make all the mortgage creditors mortgagees alike of the old and new tolls.

DENMAN C. J. It appears to me very clearly, that in this case the legal estate is in the lessor of the plaintiff. Under the general turnpike act, 3 G. 4. c. 126. s. 81., and the act of 6 G. 4. c. cxlvii., the trustees were undoubtedly enabled to convey to him such proportion of the tolls, toll-gates and toll-houses, as the sum advanced by him bore to the whole amount due or to become due on that security. But, it is said, the subsequent act,

(a) 2 B. & P. 225.

9 G. 4. c. ix., prevented the legal estate from passing to him under such mortgage, by the preference and priority given in section 11. to the other mortgagees. It is indeed clear, that his claim as mortgagee of the tolls, &c., in the proportion specified, is subject to the priority of payment, given by the latter act to the other mortgagees: but I do not apprehend that that divests him of the legal estate. If the legislature intended to vest the legal estate in the other creditors and not in him, that intention has not been accomplished. The clause gives them a priority of charge, and that is satisfied if the lessor of the plaintiff recovers as mortgagee, for the purpose of taking the tolls to the extent of that proportion which is due to him, but subject to account with the other creditors in respect of their previous claims. This accords with the view which was taken of a similar case in *Doe dem. Banks v. Booth* (a). Whatever inconvenience may be incurred if the other parties should be compelled to seek relief in equity, I cannot see any thing in the clause referred to, to prevent the legal estate in this property from vesting in the lessor of the plaintiff.

1832.

**DOE dem.
THOMPSON
against
LESLARD.**

PARKE J. When the act 9 G. 4. c. ix. passed, 17,000*l.* had already been advanced on mortgage of the tolls under the act 6 G. 4. c. cxlvii., and the mortgagees had a legal estate in them, liable only to be divested on payment of what they had advanced, or, to a certain extent, by the advance of new sums on similar mortgage, for the purposes of the then existing act. Perhaps on the completion of the road to which that act related, their legal estate was indefeasible. Then the question is,

(a) 2 B. & P. 219.

what

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—
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THOMPSON
against
LEDIARD.

what interest the present lessor of the plaintiff took under the tenth and eleventh sections of 9 G. 4. c. ix.? I have considerable doubt of his right to recover. The question turns on the construction of the words “ preference and priority of charge and payment.” Perhaps the framer of the clause did not himself know what was the effect of these words. He probably meant that the rights of those who had advanced money for the purposes of the former act should not be affected by the power given to charge the tolls under this : but they certainly are affected by another mortgagee being thrust upon them in the manner now contended for. But my mind is not fully made up on the subject, and the doubt I entertain will be of no consequence, as it is not felt by the rest of the Court.

TAUNTON J. I take the same view of the case with my Lord Chief Justice, and agree in the reasons he has given. I think that by the last act of parliament the tolls were all consolidated into one common fund, and those of the new as well as of the old road made answerable both for the former debts and for those to be afterwards incurred. So far the creditors under the preceding act derive a benefit from the new provision. In *Doe dem. Banks v. Booth* (a) the lessor of the plaintiff was mortgagee of a proportion of the tolls, and of the toll-gates and toll-houses ; and Lord *Eldon* distinguished that case from *Fairtitle dem. Myther v. Gilbert* (b), which had been cited, by observing that in this latter case the whole, and not a proportion only, of the tolls was mortgaged, and a recovery of the toll-gates by the mortgagee would in effect have given him a preference over all the other creditors ; but where, as in

(a) 2 B. & P. 219.

(b) 2 T. R. 169.

the case then before the Court, the party was mortgagee only of the proportion which his debt bore to all the sums advanced, no priority was gained, since the lessor of the plaintiff would become the bailiff of the other creditors as to all except his own proportion. That applies to the present case, and agrees with the judgment which my Lord has now delivered. I think, therefore, that the claim of the lessor of the plaintiff to the legal estate in these tolls and premises is not contrary to the preference given by 9 G. 4. c. ix. to the other creditors; and that estate being duly vested in him by mortgage, which the trustees were authorized to grant, there is nothing to prevent him from seeking his legal remedy by ejectment.

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Dor dem.
THOMPSON
against
LEDIARD.

PATTESON J. Before the act 9 G. 4. c. ix. the whole legal estate in these tolls, &c. was outstanding in the mortgagees under the former act. The estate vested in each only bore that proportion to the whole which the money advanced by him bore to the entire sum due or to become due from the trustees; but the whole of the amount for which the mortgages were held, covered the whole legal estate. By the general highway act, and by the form of the mortgages granted under it, it was open to any person subsequently making advances, to come in for a portion of that legal estate; and the question here is, whether the lessor of the plaintiff was prevented from doing so by the eleventh section of 9 G. 4. c. ix. I am of opinion that the word "charge," in that section, relates only to the application of the tolls, and not to the legal estate in them and the premises here claimed, and therefore that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

1832.

Friday,
Nov. 9th.

MELLER and Others, Assignees of Sir HARRY JAMES GOODRICKE, Bart., Sheriff of YORKSHIRE, *against* PALFREYMAN and Another.

A bail-bond given by a party attached for contempt in not putting in an answer in Chancery, is not assignable under the statute 4 Ann, c. 16. s. 20.

1 Bac. 443.

DEBT. The declaration stated that the plaintiffs on, &c. sued out of the Court of our lord the king of his Chancery, a writ of attachment, directed to the sheriff of *Yorkshire*, commanding him to attach certain parties, to answer our said lord the king, as well touching a certain alleged contempt against our said lord the king, as also such other matters as should be laid to their charge, and further to perform and abide, &c., which writ was indorsed “ By the Court, for not answering at the suit of *W. L. Meller* and others, plaintiffs; ” that the writ was delivered to the sheriff to be executed; that he took the parties and had them in custody by virtue thereof; that the defendants became bail for the said parties, and entered into a bail-bond to the sheriff in the penalty of 40*l.* conditioned for the appearance of the said parties in his Majesty’s Court of Chancery on the 13th day of *August* then next (the return day of the writ), wheresoever the said Court should then be, to answer, &c.; that the parties did not appear, whereby the bond was forfeited; and the penalty being unpaid, the sheriff, at the request and costs of the plaintiffs in this action (they being the plaintiffs in the Chancery suit), assigned the bond, by indorsement thereon, to the plaintiffs, according to the form of the statute in such case made and provided: by means whereof, and by force of the statute, &c., an action had accrued to the plaintiffs as assignees of the said sheriff, &c. Ge-

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neral demurrer and joinder. The demurrer was now argued by

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Crowder for the defendants. This bail-bond was not assignable. At common law it could not have been assigned, being a chose in action; nor could it under the statute 4 *Ann.* c. 16. s. 20., which provides that if any person be arrested “by any writ, bill, or process issuing out of any of her Majesty’s Courts of Record at Westminster, at the suit of any common person,” and the sheriff take bail, he shall, on request, assign the bail-bond by indorsement to the plaintiff, who may sue upon the same if forfeited. For that act evidently applies only to cases within the statute 23 *Hen.* 6. c. 9., which requires the sheriff to admit to bail persons arrested or in custody “by force of any writ, bill, or warrant, in any action personal, or by cause of indictment of trespass.” The words of these statutes cannot be extended to a person taken into custody to answer the king for a contempt. The Court here called upon

White for the plaintiffs. It was held by the Court of Common Pleas in *Morris v. Hayward* (a), (where the point was very fully discussed,) that the sheriff may take a bail-bond on an attachment out of Chancery, and may recover in an action of debt against the obligors. It seems to have been admitted in *Studd v. Acton* (b) that such bond is legal, though the Court thought the sheriff was not compellable to take it, for that the statute 23 *Hen.* 6. c. 9. did not extend to bail-bonds on process out of Chancery. But the words of the statute

(a) 6 *Tampt.* 569. 2 *Marsh.* 280. See *Posterne v. Hanson*, 2 *Wms. Sessd.* 59. note (c), 5th ed.

(b) 1 *H. B.* 468.

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of *Anne* are more extensive, and require that wherever any person has been arrested by any writ, bill, or process out of the Courts at *Westminster*, and bail has been taken, the sheriff shall assign the bail-bond at the request of the plaintiff in such action *or suit*; evidently referring to suits in Chancery as distinguished from actions at law; and the object being to prevent the inconvenience that might arise if actions on such bail-bonds could only be brought in the name of the sheriff, who would have it in his power to release them. In *Beddall v. Page* (a) the defendant, being taken on an attachment for not answering, gave a bail-bond, which was assigned, and no answer being put in, the plaintiff brought actions against him and his sureties on the bond, at the same time proceeding to enforce an answer by the process of the Court. An injunction was moved for, and the Vice-Chancellor said that the giving of a bail-bond was useless if no proceedings could be taken on it; and he dismissed the motion with costs. [*Parke J.* What was the nature of that assignment? In the Exchequer the practice is to take only an equitable assignment of the bail-bond on an attachment; the sheriff, on being indemnified, gives up the bond to the plaintiff's attorney, with permission to sue in his name] (b).

DENMAN C. J. It appears to me that this security is not assignable, unless the statute of *Anne* has made it so, and that the statute has not that effect. The practice which has hitherto prevailed shews what the opinion has been as to the law. It may be that bonds of this description have been equitably assigned, with permission to put them in force in the name of the sheriff:

(a) 2 Sim. 224.

(b) See *Dar's Exchequer Practice*, 113.

and

and a court of equity would take care, in such a case, that no injustice was done. But the words of the statute, authorizing a legal assignment, apply to bail-bonds given upon process at common law. It is true the expression “such action *or suit*” is used, but there is no ground for confining the term suit to proceedings in Chancery. I therefore think the judgment must be for the defendant.

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PARKE J. I am of the same opinion. It has never yet been supposed that the statute of *Anne* applied to proceedings in equity.

TAUNTON J. The words in the statute of *Anne* are, “any writ, bill or process, issuing *at the suit of any common person*,” and on bail being taken from the person against whom *such* writ, bill or process, is taken out, the sheriff, at the request of *the plaintiff in such action or suit*, shall assign the bail-bond. But, in this case, the process under which the bail-bond is taken, was not properly at the suit of any common person, being his Majesty’s writ of attachment for a contempt of court. It is also to be observed, that an action on a bail-bond is to be brought in the same court where the suit was commenced (a). And the practice affords strong evidence of the construction which has been put on the statute of *Anne*; for in the course of more than 125 years, no instance is found of an action by the assignee of such a bail-bond as this.

PATTERSON J. concurred.

Judgment for the defendant.

(a) See the authorities in note 3. to *Posterne v. Hanson*, 2 Wms. Sessd. 61.

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The KING *against* The Inhabitants of LYDLINCH.

A surrender of an old lease by a grandfather and great uncle, and the taking of a new lease by the grandson and great nephew, at a nominal fine to the lord of a manor, is not a purchase of an estate within the statute 9 G. 1. c. 7. s. 5.

ON appeal against an order of two justices, whereby *John Tucker*, his wife and children, were removed from the parish of *Hilton*, in the county of *Dorset*, to the parish of *Lydlinch*, in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case: —

By lease dated the 22d of *December* 1754, *G. Pitt*, lord of the manor of *Hilton*, demised a dwelling-house and garden, situate within the manor, to *John Tucker* of *Lydlinch* (who was the grandfather of the pauper), in consideration of a surrender made by *Arthur Corfe* and *E.* his wife, of the said dwelling-house and garden, which they claimed to hold for their lives successively (the lease having, as was recited, been consumed in a then recent fire, together with the dwelling-house, which *Tucker* was rebuilding), and also in consideration of another lease of the same premises, granted to *William Corfe*, determinable on the decease of the said *John Tucker*, and in consideration of the rebuilding of the premises by *Tucker*, and of 1s. paid by him to *Pitt*: Habendum to *Tucker*, his executors, &c., from the day of the date thereof for the term of fourscore and nineteen years, if *Tucker* and his wife, and *Meliar* their daughter, or either of them, should so long live, at the yearly rent of 1s. The lessee covenanted to pay the rent, to attend the lord's court and do suit and service there, to finish the rebuilding of the dwelling-house within two years, and to repair during the term.

John

John Tucker (the grandfather of the pauper) was the grandson of *William Corfe*, and the great nephew of *Arthur Corfe*, the surrenderors of the leases, who were brothers. It did not appear that any pecuniary consideration passed from *Tucker* to either of them. He continued to inhabit the premises until his death in 1818. It was found by the sessions that the premises were not of the value of 30*l.* when *Tucker* rebuilt the house. The question for the opinion of this Court was, whether *John Tucker*, the grandfather of the pauper, gained a settlement by estate in the parish of *Hilton*. If so, the pauper was derivately settled therein.

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Barstow and *Watson* in support of the order of sessions. This is a purchase of an estate within the meaning of the statute 9 G. 1. c. 7. s. 5., and must be governed by *Rex v. Warblinton* (a), and *Rex v. Hornchurch* (b). In *Rex v. Warblinton*, there was a grant of the waste by the lord of a manor for a nominal fine of 1*s.*; heriot 1*s.*, and quit-rent 1*s.*; and it was held that the purchase was for a pecuniary consideration, though small, and that it was within the statute. It may be said, that this was a mere family arrangement; and that it is to be inferred from the relationship of the parties, that the conveyance was not for a pecuniary consideration, but induced by natural love and affection, and therefore that the case must be governed by the cases of *Rex v. Ufton* (c), and *Rex v. Hatfield Broadoak* (d); but in those cases the relationship was that of parent and child. Here it may be presumed from the covenant to

(a) 1 T. R. 241.

(b) 2 B. & A. 189.

(c) 3 T. R. 251.

(d) 3 B. & Ad. 566.

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rebuild and keep in repair that pecuniary value was the consideration.

Jeremy, Bond and Lucena, contra. This is not a case within the statute, which is confined to purchases for pecuniary consideration, under 30*l.* *Rex v. Marwood* (a), *Rex v. Charlton* (b), *Rex v. Ufton* (c). *Rex v. Tarrant Launceston* (d) is in point. There by an arrangement among the members of the family, a lease held of the lady of the manor was surrendered, and a new lease taken, the new lease having been granted in consideration of the surrender of the old and a fine of 30*s.* Lord *Mansfield* there said, "this was not a purchase within the meaning of the 9 G. 1. c. 7. s. 5., but only a surrender of the old lease, and getting a new one on paying the fine." In *Rex v. Warblinton* (e), and *Rex v. Hornchurch* (g), it did not appear that there was any other than a pecuniary consideration.

DENMAN C. J. *Rex v. Tarrant Launceston* (d), is decisive to shew that this is not a purchase within the 9 G. 1. c. 7. s. 5.

PARKE J. The statute applies to purchases for money consideration only. Here it may be inferred, from the relationship of the parties, that natural love and affection formed an ingredient in the consideration. The lord was only the medium of the arrangement in the family.

(a) *Burr. S. C.* 386.

(c) 3 *T. R.* 251.

(e) 1 *T. R.* 241.

(b) *Cald.* 416.

(d) *Cald.* 209.

(g) 2 *B. & A.* 189.

TAUNTON J. In order to bring a case within the statute, the consideration must consist wholly of money. Here there were several considerations, and it does not even appear that there was a pecuniary one.

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PATTESON J. concurred.

Order of sessions quashed.

The KING *against* The Inhabitants of CLIXBY.

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ON appeal against an order of two justices, whereby *W. Clayton*, his wife and family, were removed from the parish of *Caistor* to the parish of *Clixby*, both in the parts of *Lindsey* and county of *Lincoln*, the sessions confirmed the order, subject to the opinion of this Court on the following case:—*Clixby* belongs, with the exception of about twenty acres of land, to one proprietor, *Mr. Harman*. There are nine occupiers of land in *Clixby*, including *Harman*, who retains some portion of his estate in his own hands; he holds no courts. The pauper (the only witness examined) stated that he had known the place thirty-three years, and had never known or heard of any pinder there before 1825. In 1825 *Harman* and two other occupiers of land in *Clixby*, of whom *Mr. Lawrence*, constable of *Clixby*, was one, ordered the pauper to go and be sworn in pinder. It did not appear in evidence that there was any public meeting of the parish, or any other meeting to appoint him. The pauper went with *Lawrence* to a justice of peace, and was sworn in. He impounded cattle in *Clixby* in that year, and continued to do so for

In 1825 three or four occupiers of land in a parish, ordered *A.* to go and be sworn in pinder, and he was sworn in before a justice of the peace, and served as pinder during that year. He was again sworn in in 1826, and served several years, residing in the parish all the time. Before 1825 there was no such officer as a pinder remembered in the parish: Held, that he gained no settlement by serving the office.

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for several years, till he was removed. In 1826 he was again sworn in before two justices of the peace. During all this time he resided in *Clixby*. The sessions found that this was a public annual office. The question for the opinion of this Court was, whether, by such service and swearing in, the pauper gained a settlement in *Clixby*.

Fynes Clinton and *Hildyard* in support of the order of sessions. The sessions have found the office of pinder to be a public annual office, and that finding is conclusive, *Rex v. Ilminster* (a). *Rex v. Corfe Mullen* (b) shews that to confer a settlement, it is sufficient if the party execute a public annual office, though he be not legally placed therein. Assuming that the pauper was not duly appointed to the office, he still gained a settlement. [*Parke J.* In *Rex v. Stogursey* (c) the mere service of the office of parish clerk, to which the party was not colourably appointed, was held not to be sufficient.] There the party was a mere intruder into it. Here the sessions must have inferred from the direction given to the pauper to go and be sworn in, that he was appointed with the consent of the parish. And he was sworn in two successive years; not, indeed, by the court leet, but by a justice, upon whom that duty would devolve in default of a court leet being held.

Whitehurst contra. The office of pinder is in no instance a public annual office. There is no authority for saying that there was ever a legal office of pinder in parishes, though there is in manors. The duty of the pinder is to prevent encroachments on the lord's

(a) 1 *East*, 83.(b) 1 *B. & Ad.* 211.(c) 1 *B. & Ad.* 795.

waste: he is the mere servant of the lord of the manor, not of the parishioners. It is an employment rather than an office. To constitute an office there must be some public duties to perform, for the breach of which an indictment will lie. The ale-taster and hog-ringer are appointed at the court leet. The duty of the former was to inspect weights and measures, and to warn the jury to serve at the court leet. The hog-ringer is an office of public benefit to the parishioners, with certain stated fees in respect of such service. [*Parke J.* It is to prevent a public nuisance](a). Here, too, the pauper was appointed by three individuals only, and not by any competent authority, and that appears on the face of the case.

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DENMAN C. J. The court of quarter sessions have found this to be a public annual office, subject to the opinion of this Court on the evidence. We think their finding is not warranted by the facts which they have stated. The office of pinder in this parish is not proved to be ancient, for it is not known that there was any such officer before 1825. Nor was the pauper appointed by any authority known to the law. The hog-ringer is an annual officer of great public utility, appointed at the court leet. It is not necessary to decide generally whether a pinder, properly appointed, be a public annual officer within the act; it is sufficient to say, that under the circumstances of this case, the office was not in this parish a public annual office.

PARKE, TAUNTON, and PATTESON Js. concurred.

Order of sessions quashed.

(a) See *Rex v. Whittlesea*, 4 T. R. 807.

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A female pauper hired for a year, was, during the year, apprehended and fined for having committed a malicious trespass, contrary to the statute 7 & 8 G. 4. c. 30. She went to prison instead of paying the fine, by the advice of her mistress, who told her to return when her time was out; and after her imprisonment, which lasted a month, she did return to her service, and continued in it till the end of the year, and was paid her whole year's wages: Held, that there was a dispensation with the service during the month of her imprisonment, and that she gained a settlement.

ON appeal against an order of two justices, whereby *E. Plintham*, single woman, was removed from the parish of *Coningsby*, in the parts of *Lindsey*, in the county of *Lincoln*, to the parish of *Stickney* in the said parts and county; the sessions discharged the order, subject to the opinion of this Court on the following case:—

A few days before *May-day* 1829, the pauper was hired by Mr. *Gosling*, from the same *May-day*, at the wages of 3*l.* 10*s.*, and went into his service, in the parish of *Stickney*, on that day. About harvest time, in the same year, she was apprehended upon the complaint of *W. Foster*, her master's neighbour, on a charge of having wilfully and maliciously damaged property belonging to him. The magistrates before whom the complaint was heard, fined her, and she, not paying the fine, was committed to prison for one month. It was by the advice of the mistress (who was present at the hearing of the complaint) that the pauper went to prison instead of paying the fine. When she was taken to prison, her mistress told her she was to return when her time was out, and she also sent her provisions occasionally during her imprisonment. She was discharged at the end of the month, returned immediately to her master's, and went about her work as usual. She staid in the service till *May-day* 1830, and on going away received her whole wages. The question
for

for the opinion of this Court was, whether, under these circumstances, she gained a settlement in the parish of *Stickney*.

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Hildyard in support of the order of sessions. There was not, in this case, a service for a year, or any dispensation with service during the period of the imprisonment. There are two classes of cases applicable to this subject; one, where the servant has been committed to prison for bastardy, as in *Rex v. Westmeon (a)* and *Rex v. North Cray (b)*, and the other where he has been committed for misconduct in his service, as in *Rex v. Hallow (c)* and *Rex v. Barton-upon-Irwell (d)*. In the first class of cases, it has been held that no settlement was gained, by reason of the interruption of service during the time the party was in custody. In *Rex v. Hallow* and *Rex v. Barton upon Irwell*, which will be relied upon by the other side, the servants were committed at the instance of the master, and the contract of service was held to continue; but those cases are distinguishable from this, because there the imprisonment was for the purpose of enforcing the contract of service. There is no case which establishes that there may be a constructive service under circumstances where actual service is impossible. The insertion of the provision in the militia acts, that service in the militia shall not be deemed absence from service, shews that an absence by legal compulsion would otherwise prevent the time lost by such absence from being reckoned for the purpose of settlement. It may be said here that the going to

(a) *Cald.* 129.(b) *Cald.* 495.(c) 2 *B. & C.* 739.(d) 2 *M. & S.* 329.

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prison was voluntary; but the fallacy of that argument consists in representing the alternative (of not going) as clogged with no condition, whereas the condition was "to pay a fine," which might be less eligible; if so, it was the duty of the mistress to dissuade the pauper from paying it; and it is to be presumed the sessions have thought so by their deciding as they have. Besides, the imprisonment was not voluntary; for suppose the justices to have acted without authority, and the pauper to have brought an action, the defendant could not have alleged that the pauper had imprisoned herself, because she might have paid the fine. But assuming it to be voluntary, there cannot have been a dispensation, because the master could not dispense with services which he could not command. It is of the essence of constructive service that actual service shall have been possible. In *Rex v. St. Peters (a)*, Lord Kenyon stated the distinction to be, "that where the servant continued liable to serve during the whole year, though the master dispensed with the actual service for any part of it, the servant gained a settlement, because the relation of master and servant subsisted all the year, and the master might resume the right to the service if he chose; but that where the parties absolutely put an end to the contract before the expiration of the year, the servant did not gain a settlement." Here the master could not during the term of imprisonment command the services of the pauper. It is like the case of the militia-man, who, not being sui juris, cannot contract to serve for a year, *Rex v. Taunton St. James (b)*.

(a) 8 T. R. 478.

(b) 9 B. & C. 831.

Fynes Clinton contrà. This is an ordinary case of dispensation with service. In *Rex v. Westmeon* (a) and *Rex v. North Cray* (b), the servants, after the imprisonment, never returned to their masters. Here the pauper did return, and received her whole year's wages. In *Rex v. Kenilworth* (c), *Buller J.* says "the circumstance of the pauper having been apprehended on a charge of bastardy, I lay out of the question, for it was competent to the master to receive him back again after he was discharged out of custody, if he pleased." Here the absence from the service was permissive, for her mistress advised the pauper to go to prison instead of paying the fine, and told her when her time was out to return to her service. In *Rex v. Barton-upon-Irwell* (d), the pauper was, on the complaint of his master, committed to prison for a month. At the end of nine days, he was discharged at his master's instance, returned immediately to his service, and served seven months over his year; and though he received no wages for the time he was in custody, it was held that there was no dissolution of the contract, and that the pauper gained a settlement. As to the impossibility of service during the absence, that argument might be used in many cases where, however, there is no doubt of the dispensation. The clause in the militia acts was intended to prevent a dissolution of the contract of service; but, independently of such clause, if a master received a pauper into his service after an absence occasioned by his being a militia-man, that would have been a dispensation. [*Parke J.* The clause prevents the master from refusing to take the servant back, as he otherwise might.]

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(a) *Cald.* 129.(b) *Cald.* 495.(c) 2 *T. R.* 600.(d) 2 *M. & S.* 329.

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DENMAN C. J. This head of settlement is made to depend upon two things: first, there must be a hiring for a year; and, secondly, an abiding and continuance in the same service for a whole year. Those words, strictly construed, would perhaps import actual service. It has been decided, however, that there may be a dispensation by the master with the performance of the servant's duties for a time, and that during such period there is a constructive service, sufficient to satisfy the words of the statute. The consent of the master to dispense with such service may be either express or implied: and it is implied, where the servant, having absented himself for a time, has returned to the service, and been received by the master, and had his full wages paid. I think, in this case, the absence of the pauper during the imprisonment must be taken to have been with the consent of the mistress. It may be collected from the statement that the pauper could have paid the fine, and that the mistress interfered to prevent her. After the term of imprisonment expired, she received her back, and paid her her full wages. It has been ingeniously argued, that the absence here was not permissive, because the law compelled the pauper to be imprisoned unless she paid a fine. But she had her election, either to pay the fine or go to prison; and she did the latter by the advice of her mistress, who supplied her with provisions during her confinement. It seems to me, therefore, that the service was dispensed with by the mistress. *Rex v. Westmeon* (a), and *Rex v. North Cray* (b), are distinguishable, for there the masters did not consent to the absence, and shewed their dissent in the most effectual way by deducting from the wages.

(a) *Cald.* 129.(b) *Cald.* 495.

PARKE

PARKE J. To constitute a settlement by hiring and service, there must be a hiring for a year and a service for a year, but the service need not be actual; of necessity it may be constructive, because no servant serves his master every hour of every day; and a dispensation from service may be implied. Even in the case of a wilful absence, it has been held that if a master receive back his servant afterwards, and pay him his wages, that is a dispensation with the service during the period of absence. In *Rex v. North Cray*, and *Rex v. Westmeon*, the absence of the servant was wilful, for the imprisonment was occasioned by his own misconduct, but those cases are distinguishable from the present, because the pauper never returned to the service after the imprisonment. Absence during imprisonment, like absence from other causes, may be purged by consent. It has been said that the master during the term of imprisonment could not recall the pauper to his service. But, as Mr. *Clinton* has observed, the same may be said where the absence is occasioned by illness, proceeding from the misconduct of the servant; or where the servant during such absence is at a great distance from the master.

TAUNTON J. I am of the same opinion. *Rex v. North Cray* and *Rex v. Westmeon* are distinguishable, because it did not appear that the master again received the servant into his service; but I cannot help thinking the good sense to be in what is stated by Lord *Mansfield* and Buller J. in *Rex v. North Cray*. The pauper, eight or nine days before the expiration of the service, had been committed for not giving security to indemnify the parish, as the father of a child likely to be born a

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bastard, and Lord *Mansfield* says, “The single question is, whether the pauper served his year; in *fact* he did not; did he then *constructively*? There is not a pretence that the master consented to dispense with the time he did not serve; *his absence and imprisonment were the consequences of his own criminality*. His imprisonment was not illegal.” Those observations apply to the present case; and I think this doctrine of dispensation has been carried too far. The current of authorities, however, compels me to say there may be a constructive service even during the time for which the servant is committed in execution for misconduct; and I yield to authorities, not to reason.

PATTESON J. I think that we are bound by the authorities to hold that there was a dispensation with the service during the time the pauper was imprisoned.

Order of sessions quashed.

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The KING *against* JOHN HEARLE TREMAYNE,
Esquire.

AN owner of the soil, who has granted to adventurers liberty to dig, mine, work and search for manganese for twenty-one years, and the same to take, and convert to their own use, and to make adits, shafts, &c. rendering to him 1*l.* 15*s.* for every ton weight of manganese raised during the term, is not an occupier of any portion of the soil, and consequently not rateable to the relief of the poor.

IN a rate made for the relief of the poor of the parish of *Maristow*, in the county of *Devon*, on the 15th of *September* 1831, *J. H. Tremayne*, Esq. was assessed “for manganese dues,” in the sum of 7*l.* 10*s.* He appealed against the rate, on the ground that he was not the occupier of any manganese dues in the parish; and also that he was not liable by law to be assessed in the said

rate,

rate, for or in respect of any manganese dues. The sessions confirmed the rate, subject to the opinion of this Court on the following case: —

H. H. Tremayne, clerk, the deceased father of the said *J. H. Tremayne*, being tenant for life, with a power of granting leases and settlements of the lands hereinafter mentioned, did, by indenture, bearing date the 23d of *October* 1815, and made between the said *H. H. Tremayne* of the one part, and *John Williams*, Esquire, of the other part, grant unto *Williams*, his partners, fellow adventurers, &c., liberty, licence, and authority to dig, work, mine, and search for manganese, in and throughout all those messuages, farms, tenements, and premises, called *Allerford*, *Lea Down*, and *Holster Yard*, situate in the parish of *Maristow*: and the same manganese there found, to raise and bring to grass, and there to pick, dress, cleanse, and make merchantable and fit for sale; and the same to take and carry away, convert, and dispose of at his and their will and pleasure. The said indenture also gave them liberty, within the before-mentioned limits, to make and work such adits, shafts, pits, watercourses, &c., and to erect such engines and other buildings, as they should think necessary or convenient; and it gave them also the use of waters and watercourses within the said limits, with liberty to divert the same, &c. for the more effectually and beneficially exercising and enjoying of the liberties, powers, and authorities by the said indenture granted; excepting unto *H. H. Tremayne*, his heirs and assigns, all other ores, minerals and metals, and all quarries of stone and slate within or under the said premises, or any part thereof, with full power and authority to them, their workmen and agents, into and upon any part of the

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same premises to enter, and in any manner to search for, break, land, stamp, and dress the said last mentioned ores, minerals, metals, stone and slate, and to take and carry away the same. The grant was for twenty-one years from the 15th of *March* then last past; yielding and paying unto the said *H. H. Tremayne*, his heirs or assigns, the sum of 1*l.* 15*s.* for every ton weight of the said manganese raised or gotten during the term within the limits of the said settlement; free and clear of and from all charges and expenses of raising, dressing and returning the same, or otherwise incident to the adventure.

H. H. Tremayne died on the 10th of *February*, 1829, and the appellant succeeded him, and is now seised as tenant for life of the lands above described, subject to the said grant or settlement, and (as to some of the lands) to leases at rack-rent hereinafter mentioned. By virtue of the grant, and within the limits thereby described, the said *J. Williams*, with his partners and co-adventurers, have dug and sunk shafts, driven adits and levels, and opened pits for the purpose of searching for and raising manganese. They have also erected crushing-machines, worked by water wheels, for pulverizing the ore when raised, and built houses and sheds for dressing and cleaning the same. The whole of these works have been undertaken and performed at their sole risk and expense, by their own labourers, and under the entire direction and superintendence of their own agents, and without any expense, risk, or interference whatsoever of, or on the part of, either *H. H. Tremayne* or *J. H. Tremayne*; and the whole have continually been, and still are, in the sole and exclusive possession and occupation of the said *J. Williams*, his
partners

partners and co-adventurers. Considerable quantities of manganese have from time to time been raised by them, the whole of which, after undergoing several processes of pulverizing, dressing, and cleansing at a great expense, have been sold and disposed of by them as and to whom they thought fit.

J. Williams and his co-adventurers have regularly accounted with *H. H. Tremayne*, in his lifetime, and since his death with *J. H. Tremayne*, for the 1*l.* 15*s.* per ton reserved by the said indenture, and the assessment now appealed against is laid in respect of the said money payments. The tenements and farms of *Allerford* and *Lea Down*, part of the lands comprized within the limits of the above settlement, are let to and occupied by tenants at rack-rent, subject to a reservation of mines, ores, metals and minerals, with the usual powers of digging and searching for the same; those tenants are respectively assessed to the poor rates of the parish in respect of such occupations, proportionably with the other farmers and occupiers of lands in the parish; and the tenement and farm of *Holster Yard*, the residue of the lands within the same limits, are in the occupation of the said *J. H. Tremayne*, who is also rated in the rate appealed against in respect of such occupation.

The question for the opinion of the Court is, whether, under these circumstances, Mr. *Tremayne* can be considered such an occupier in the parish of *Maristow*, as to make him liable for the above rate for manganese dues.

Kelly and *Escott* in support of the rate. Mr. *Tremayne* was liable to be rated for these manganese dues, as an occupier of land in the parish of *Maristow*, because, by the conveyance, no interest in the land

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passed out of him, but a mere easement; and he was a beneficial occupier, by receiving 1*l.* 15*s.* per ton on all ore raised. There are two classes of cases applicable to this subject. In the first are *Rowls v. Gells* (a), *Rex v. The Baptist Mill Company* (b), and *Rex v. St. Austell* (c). In *Rowls v. Gells* (a) the lessor under the crown of lead mines, being entitled to a certain portion of the ore raised from the mines, was held to be rateable in respect of the profit arising from such portion as an occupier of land, because they who had a right to raise it had but a qualified occupation, or rather a mere right of working the mines of the lord or owner, and of taking a portion as their remuneration for raising the lord's or owner's proportion. And *Rex v. The Baptist Mill Company* (b) shews, that if this portion be granted to a lessee the lessee is rateable; for it is a lease of such an interest in the land itself, as renders him the occupier. In *Rex v. St. Austell* (c), which very much resembles the present case, the owner of the soil, by indenture, granted to certain adventurers full and free liberty to enter on the land and work mines, and to erect buildings on the land for that purpose, &c.: and it was agreed that the adventurers should raise the ores, and prepare them for smelting, and when in that state, taking the remainder for their own use, leave a certain proportion for the use of the lessor, or pay him a certain portion of the amount arising from the sale of all the ores, at the option of the lessor. It was held, that the lessor was rateable in respect of the profits arising from the mine in the value of his portion of the ores, as the profits of land;

(a) *Cowp.* 451.(b) 1 *M. & S.* 612.(c) 5 *B. & A.* 693.

for

for he still continued to be the occupier of the mine, and the adventurers had not the unqualified occupation, but were merely entitled to take a certain part of the produce of the land as a remuneration for their expenditure, risk, and labour, in raising the rest for the owner. It was not material that the lessor had always elected to be paid in money, for in taking his portion and so paying him, the adventurers were simply in the situation of purchasers.

On the other hand, in *Rex v. The Earl of Pomfret* (a), the proprietor of the soil, having made a demise of the land in which there were mines, with a power to work them, reserving a certain pecuniary rent, was held not to be rateable in respect of the rent, because the lessee under such demise was the exclusive occupier of the mines, and the profits of land were rateable only in the hands of the occupier, the rent reserved being merely a criterion of the amount of the profits, and not itself rateable. In *Rex v. The Bishop of Rochester* (b) nothing was left in the grantors; the mines were let, and wholly out of their power; and there was a money rent reserved. The grantors there were held not rateable, there being no occupation of any thing by them within the 43 *Eliz. c. 2*.

The question is, to which class of cases the present belongs, and if the two conflict, which is to prevail? Here, there is no demise of the land or of the mine, but of a mere liberty to dig, as there was in *Rex v. St. Austell* (c): now, whatever did not pass out of the grantor by the deed, remained in him; a mere easement passed and not the soil; that therefore remained in Mr. Tre-

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(a) 5 *M. & S.* 139.(b) 12 *East*, 355.(c) 5 *B. & A.* 695.

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mayne. Between this case and *Rex v. St. Austell* (a) the difference is, that in the latter, the adventurers were to leave a certain proportion of the ore for the use of the grantor; and here, the adventurers are to pay 1*l.* 15*s.* for every ton raised; and Lord *Tenterden* distinguishes *Rex v. St. Austell* from *Rex v. The Earl of Pomfret* (b), on the ground that in the latter there was an absolute demise of all the mines, under which both the possession of that part which was worked, and that which was not worked, passed to the lessees, whereas, in *Rex v. St. Austell*, there was an express reservation of part; the relation of the parties was not that of landlord and tenant. So here *Tremayne* has reserved to himself all but a mere liberty to dig on part of the lands. [*Parke J.* What portion of the soil does *Tremayne* occupy? Whatever portion yields the ore in respect of which he receives the money payment. The same question might have been put in *Rex v. St. Austell*. *Tremayne* occupies the land producing the ore till it is separated. [*Parke J.* He has no right to any portion of the rude ore.] He does not cease to be an occupier of the soil because another person may take ore from it. So long as the ore is not severed from the land, it is parcel of the freehold, and is his property; when severed, it becomes personal property, and belongs to another. [*Parke J.* The decisions on which you rely, proceeded on the ground that a certain portion of the rude ore was reserved to the lord. If Mr. *Tremayne*, as you contend, is the occupier of the mine, then, as such, he is not rateable.] In *Roads v. Gells* (c), there was in part a pecuniary rent, the cope being sixpence for

(a) 5 B. & A. 693.

(b) 5 M. & S. 139.

(c) *Cowp.* 451.

every

every load or nine dishes of lead ore raised at the mines. [Parke J. That distinction was not pressed on the attention of the Court, and the principles on which such property is rateable were not so well understood as they are now.] The result of all the authorities is, that where by lease the interest in the land has passed out of the grantor, the grantee is rateable, but where such interest has not passed, the grantor is. Then, if Mr. Tremayne was the occupier of the land, he was clearly a beneficial occupier in respect of the 1*l.* 15*s.* per ton, which he receives on all the ore raised.

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Follett (and *Crowder* and *Praed* were with him) *contra*, was stopped by the Court.

DENMAN C. J. The rate cannot be supported. Here the landlord receives a rent, and is not the occupier of the soil as in *Rowls v. Gells* (a). In *Rex v. St. Austell* (b), the landlord, by the express terms of the grant, was to be paid, not by money, but by the produce of a part of the mine, unless he elected to be paid in money. Here he is paid by a sum of money, in proportion to the weight of manganese raised; but he has no right to any portion of the ore. If we had any doubt, we would permit the rate to stand, that the party rated might bring an action; but we have no doubt whatever. The order of sessions must therefore be quashed.

PARKE J. A party can only be rateable as the occupier of land. Here Mr. Tremayne is not the occupier of the soil; he receives a money rent. The case falls

(a) *Cowp.* 451.

(b) 5 B. & A. 693.

within

1832.

Monday,
Nov. 12th.HEATH *against* SANSOM and EVANS.

S. and *E.* were partners in alum works, for an indefinite period. *E.* was a dormant partner. In January 1829 it was agreed that the settlement of the partnership accounts, and all questions concerning the respective liabilities, and the mode of winding up the affairs, and the manner and time of dissolving the partnership, should be referred to an arbitrator; and it was afterwards agreed that *S.* and *E.* should respectively bid for the plant, utensils, and fixtures, and the referee was to declare the highest bidder to be the purchaser. In April 1829 *S.* having been declared the highest bidder, became the purchaser, and the works were entirely given up to him: Held, that the partnership was then determined, although the referee had made no order as to the dissolution; and that *S.* had no authority, after that time, to bind *E.* by a promissory note.

5 Bac. 405.

ASSUMPSIT by the plaintiff, as indorsee, against the defendants, as makers, of a promissory note for 300*l.*, dated *July* 1st, 1829. Plea, by the defendant *Evans*, the general issue. *Sansom* suffered judgment by default. A rule in this case, for a new trial, having been made absolute, in *Easter* term 1831 (*a*), the cause came on to be tried before Lord *Tenterden* C. J., at the sittings in *Middlesex* after *Hilary* term 1832; and the following facts were proved:— Before *January* 1829, *Sansom* and *Evans* were partners in some alum works at *Bristol*; *Evans* was not held out to the world as a partner; the trade was carried on under the style and firm of *Philip Sansom and Co.* On the 26th of *January* 1829, *Sansom* and *Evans* agreed that the settlement of the accounts of the partnership subsisting between them as manufacturers of alum, and all questions between them concerning their respective liabilities in the partnership transactions, the mode of winding up the affairs of the partnership, and the manner and time of dissolving it, should be referred to the decision of *H. O. Price*, and that they would abide by his decision. In *April* 1829, it was agreed between *Sansom* and *Evans*, as to the disposal of the plant, utensils, and fixtures on

(a) See 2 B. & Ad. 291.

the alum works, that each should separately offer a price, which was to be communicated to the referee, and he was then to declare the highest bidder to be the purchaser; such purchaser to give a bill for the purchase money, and to be entitled to the possession of the goods purchased. In the same month of *April*, Sansom having, by letter to the referee, made a tender of 130*l.* for the said plant, utensils, and fixtures, they were declared by the referee to be his property; and the works were entirely given up to him. In *July* 1829, Sansom, being called upon by the *Droitwich* Salt Company to pay a sum of 300*l.* which he owed them, gave the promissory note in question for 300*l.*, and the note was indorsed by the company to the plaintiff. Upon this evidence, Lord *Tenterden* was of opinion that there had been, in *July* 1829, no actual dissolution of the partnership; and a verdict was found for the plaintiff, for the amount of the note. A rule nisi having been obtained for a new trial, on the ground that the partnership must be taken to have been actually dissolved in *April* 1829, when Sansom became the purchaser of the plant, utensils, and fixtures on the alum works,

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against
SANSOM.

Sir *James Scarlett* and *Hoggins* now shewed cause. Sansom had *prima facie* an authority to bind his partner by bills of exchange and promissory notes, and that authority continued in *July* 1829, unless the partnership was previously put an end to. The submission to *Price* cannot operate as a dissolution. It was a proceeding preparatory to it, but it clearly was not intended that the relation of partnership should then cease, for *Price* was to determine concerning the time and mode of dissolving it. He never did so determine before *July* 1829,

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1829, and this partnership then continued, notwithstanding any transaction as to the plant and fixtures.

Bompas Serjt. and *Ball* contra. The authority of one partner to bind another by his promissory note, is implied from the relation of partnership, and ceases as soon as the partnership is determined, unless such party has held himself out as a partner to the world, or to a third person, and thereby induced others to give credit on the faith of such partnership. Here, *Evans* never so held himself out, but was a mere dormant partner. The only question, therefore, is, whether the partnership, as between *Evans* and *Sanson*, was dissolved? No formal agreement is necessary to effect a dissolution; any writing, words, or conduct, from which a clear intention to dissolve the relation can be collected, is sufficient. Conceding that the agreement of reference did not amount to an actual dissolution, but was preparatory to it; in *April* 1829 it was agreed that the referee should declare which of the two was to be the purchaser of the plant, fixtures, &c., and that this person should be entitled to the possession of the goods purchased. *Price* declared *Sanson* to be the purchaser, and he took to the stock in trade, and became the sole proprietor. After that time the partnership was at an end, and *Sanson* could have no authority to bind *Evans* by his promissory note.

DENMAN C. J. I am of opinion that the rule for a new trial must be made absolute in this case, because *Evans*, at the time when the note was given, had ceased to be a partner with *Sanson* in the alum business. In *January* 1829, it was agreed that all matters concerning the mode of winding up the affairs of the partnership,

nership, and the manner and time of dissolving it, should be submitted to a referee. It was afterwards agreed that the plant, utensils, and fixtures on the alum works, were to be declared by the referee to belong to him who should be the highest bidder, and in *April* 1829, *Sansom* was declared to be the highest bidder, and became the purchaser, and the plant, utensils, and fixtures, were delivered up to him. *Evans* having, then, parted with all his interest in the works from which the profits of the business (if any) were to arise, ceased to have any right to participate in such profits; and since a partnership, as between parties, results from the agreement to share in profits, it ceases as soon as such right is determined. This note, then, being given after *Sansom* had become the sole proprietor, and after the implied authority, resulting from the relation of partnership, was at an end, could not bind *Evans*.

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PARKE J. The rule for a new trial must be made absolute. The objection to the plaintiff's recovering against *Evans* is, that in *July* 1829 *Sansom* was incompetent to bind *Evans*. It must be taken upon the evidence (a) that the partnership was to continue for an indefinite period (there being no proof to the contrary), and then either party might, at any time, have put an end to the partnership by a simple notice to his copartner, *Peacock v. Peacock* (b), *Featherstonhaugh v. Fenwick* (c), *Nerot v. Burnand* (d); à fortiori by a mutual agreement. Then the question is, was the authority of *Sansom* to bind *Evans* (which is implied by law from the relation of partnership) determined in *July*, when the note was given? In *Ja-*

(a) The only proof of partnership was by declarations of *Evans* to that effect.

(b) 16 Ves. 49.

(c) 17 Ves. 298.

(d) 4 Russ. 260.

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January 1829, it was agreed between them, that the settlement of the accounts of the partnership, and all questions concerning their respective liabilities in the partnership transactions, and concerning the mode of winding up the affairs, and the mode and time of dissolving the partnership, should be referred to an arbitrator. The expression *dissolving the partnership* is ambiguous. It may either import the dissolution of the joint tenancy in the goods belonging to the firm, and the division of the partnership effects, or a putting an end to their future dealings, and the mutual authority of one party to bind the other by future contracts, or both. If the first be the true import of the words, and the intention was by them to provide that the arbitrator was to decide when and how the partnership effects were to be divided, it may be inferred from the other terms of the agreement, which are those generally used on a complete dissolution of partnership, that the power of entering into future contracts had already been put an end to. But, assuming that not to be so, and that the arbitrator was to determine not merely when and how the effects were to be divided, but when that mutual authority was to be put an end to, we must then look to the subsequent conduct of *Evans* and *Sansom*, to see whether they intended that the one should have a right to bind the other by future contracts so late as *July* 1829. In *April* 1829, it had been arranged between them, that the one who made the highest offer for the plant, utensils, and fixtures, was to have them, and be put into possession. *Sansom*, having been the highest bidder, took possession of them in the same month. Now, after that, it never could have been in the contemplation of the parties that the one should bind the other by future contracts. When that had been done, there

there can be no question but that, as between *Sansom* and *Evans*, the right to participate in the profits arising from the plant, utensils, and fixtures (if any had been made), ceased, and consequently the mutual power to bind each other by contracts within the scope of their former partnership dealings, ceased also, and that *Sansom* had no authority afterwards to bind *Evans* by any future contract. It is to be borne in mind that *Evans*, who never held himself out to the plaintiff as a partner, could be liable only by reason of the authority which *Sansom* really possessed, and unless that authority continued to *July* 1829, he was not liable at all. But if it was not determined in *January*, it certainly had ceased in *April* of that year.

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TAUNTON J. I am of the same opinion ; and for the same reasons. *Evans* was a dormant partner with *Sansom*. The authority of the latter, therefore, to bind the former, ceased as soon as the partnership was at an end ; which, at the latest, was in *April*. *Price*, to whom it was referred to settle the time and mode of dissolving the partnership, at that time declared *Sansom* to be the purchaser of the partnership effects, in consequence of the tender made by him. *Evans* then sold his interest in the partnership concern to *Sansom*, and the latter assented to such sale ; and he afterwards conducted the business exclusively for his own benefit. After the sale, there was only one person concerned in the business, and the authority of *Sansom* to bind *Evans* ceased.

PATTESON J. I am of the same opinion. A dormant partner may retire from a firm, without giving notice to the world. The question is, whether *Evans* did retire from the partnership before *July* 1829 ? It is quite

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clear on the facts of the case, that he retired from it in *April* 1829; for, from that time, *Sansom* only was entitled to the works, and to all the profits to be derived from them. The authority, therefore, which *Sansom* previously had to bind *Evans*, was countermanded in *April*.

Rule absolute.

Tuesday,
Nov. 13th.

The Dock Company of KINGSTON-UPON-HULL
against PRIESTLEY.

By statute
14 G. 3. c. 56.
s. 42. the fol-
lowing tonnage
duties were
imposed on
every ship or
vessel (except
those in the
King's service,
coming into or
going out of
the harbour,
basin, or docks
of the port of
*Kingston-upon-
Hull*, or load-
ing or unload-
there.

1. For every
ship coming to

or going between the said port and any port to the northward of *Yarmouth* or southward of *Holy Island*, 2*d.* per ton. 2. For every ship coming to or going between the said port and any port or place between the *North Foreland* and *Shetland*, on the east side of *England*, except as above, 3*d.* 3. For every ship trading between the said port and any other port or place in *Great Britain* not before described, 6*d.* The duties to be paid on the ship's entry inwards, or clearance or discharge outwards; or, if there were no entry, then to be paid at the custom-house at any time before the vessel proceeded:

Held, that the first clause related only to ports on the east side of *England*, between the places there named; that it extended to the port of *Goole*, though situate twenty-five miles inland from *Hull*, on the river *Ouse*; and, therefore, that vessels taking all, or part of their cargoes at *Goole* and going to *Hull*, or vice versa, were liable to the duty of 2*d.*; and this, though they did not enter or clear at the custom-house: Held also, that the first clause did not apply to vessels loading at *Leeds* or other places, not ports, situated above *Hull*, and going directly thither; that the third clause (if those places were contemplated by it) did not refer to them with the precision necessary for imposing a duty: and, (*Parke J.* dubitante,) that the vessels so loading at *Leeds* did not become liable to duty by merely passing through the entrance basin of the *Goole* docks, without taking in goods or making any stay there.

&c.

DEBT for tonnage dues. At the trial before *Vaughan B.*, at the *Yorkshire* Summer assizes, 1831, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following special case.

The defendant is clerk to the *Aire* and *Calder* Navigation Company, who are properly sued in his name.

The action is founded on the statute 14 G. 3. c. 56. s. 42., which enacts that in consideration of the charges incurred and to be incurred by the *Hull* dock company, in making and keeping in repair the dock, quay, &c. therein mentioned, there shall be paid from and after,

&c. to the said company, “for every ship or vessel (the king’s ships of war, and other ships and vessels employed in his majesty’s service only excepted) coming into or going out of the said harbour, basin or docks, within the port of *Kingston-upon-Hull*, or unlading or putting on shore, or lading or taking on board any of their cargo, or any goods, wares, or merchandize within the said port, by the master or commander, owner or owners of every such ship or vessel, the several rates or duties of tonnage (according to the full of the reach and burthen) hereafter particularly rated and described; (that is to say)

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Company
against
PAKETRY.

For every ship or vessel coming to or going between the port of *Kingston-upon-Hull* and any port to the northward of *Yarmouth* in *Norfolk*, or any port to the southward of the *Holy Island*, for every ton, two pence. For every ship or vessel coming to or going between the port of *Kingston-upon-Hull* and any port or place between the *North Foreland* and *Shetland*, on the east side of *England*, except as above, for every ton, the sum of three pence. For every ship or vessel trading between the said port of *Kingston-upon-Hull* and any other port or place in *Great Britain*, not before described, for every ton, the sum of six pence.” The clause then fixed other dues for vessels trading to foreign places, which were enumerated; and “For every ship or vessel sailing coastwise or otherways, and coming into the said haven in ballast to be laid up, for every ton (coasting duty included), the sum of six pence.” Which rates and duties were vested in the Dock Company, and were to be paid at the time of the ship’s “entry inwards, or clearance or discharge outwards,” or, “in case any ships or vessels should not enter as aforesaid, then, at any time before such ships or vessels should

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should proceed from the said port, at the custom-house in the said port."

Section 44. provides that the act shall not extend to charge with the said duties any vessel "which shall come or go coastwise from or to any port or place in *Great Britain*, to or from any place up the rivers *Trent* or *Ouse*, within the limits of the port of *Hull* as now used, or to or from any other place up the said rivers *Trent* or *Ouse*, or any other river which falls into the said rivers or either of them, or which shall trade between any such port or place in *Great Britain* and any such place as aforesaid, within or up the said rivers or either of them, unless such ship or vessel shall come into or go out of the said basin or dock, or any part of the said harbour or haven called *Hull Haven*; or shall use the said basin, or dock, or quays, within the said harbour;" or shall unlade or lade goods in any part of the *Humber*: or to charge any such coasting vessel, going or being called by the officers of the customs into the said harbour for the sole purpose of being entered or cleared at the custom-house there. Section 45. declares that all goods landed or discharged at the company's quays or wharfs shall pay the same wharfage, and in like manner, as goods discharged in the port of *London*. Sect. 49. enacts, that no officer of the customs of the port of *Kingston-upon-Hull* shall hereafter give or make out any coquet, or other discharge, or take any report outwards, for any ship or vessel trading or coming to the said port, until the rates, duties, and payments hereby granted or payable by the master or other person taking charge of such ship or vessel, according to the tenor and true meaning of this act, shall be paid unto the respective collectors or officers appointed to receive the same as aforesaid; and that such

master

master or masters, or other persons taking charge of such ship or vessel, shall produce an acquittance, under the hand of such collector or officer, testifying the receipt thereof; which receipt such officer is required to give, under a penalty.

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—
HULL Dock
Company
against
PAIRSTLEY.

By acts of 42 G. 3. and 45 G. 3. the Dock Company were empowered to make additional docks, and the rights and privileges of the then present port of *Kingston-upon-Hull* were extended to the company's docks and basins, and the same were to all intents and purposes to be deemed part of the said port; and vessels entering into, or loading or unloading in the said docks and basins, were declared subject to the same regulations and duties as they would have been liable to in the said port.

The case then stated the situation of *Goole*, (on the river *Ouse*, twenty-five miles west of *Hull*,) the establishment of docks and quays there by the *Aire and Calder* Navigation Company, and the commission in 1827, appointing *Goole* to be a port in the United Kingdom for the import and export of goods; on which points a fuller detail will be found in *The Hull Dock Company v. Browne* (a). It was further stated that *Grimsby* is an ancient port on the *Humber*, to the south-east of *Hull*, and about thirty years ago was constituted a port for foreign trade. The case then stated the decision of this Court in *The Hull Dock Company v. Browne* (a), where it was held that a vessel sailing with goods from *Goole* to *Hamburgh*, was not liable to the duties given by 14 G. 3. c. 56. s. 42. as a vessel lading or unlading *within the port of Kingston-upon-Hull*. After that decision the Dock Company ceased to demand duty for vessels trading between *Goole* and foreign ports, but

(a) 2 B. & Ad. 43.

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they claimed those now in question. The cases to which this action related were four: all occurring in *April* 1831.

A steam-vessel belonging to the *Aire and Calder* Navigation Company, called the *Eagle*, took on board a cargo of goods at *Goole*, and proceeded therewith to the port of *Kingston-upon-Hull*, came into the basin of the *Humber* dock, within the said port, and there unladed her cargo on the Dock Company's quay.—A sloop, also belonging to the Navigation Company, and called the *Stanhope*, took in part of her cargo at *Leeds*, and proceeded therewith to *Goole*, where she took on board the remaining part of her cargo, and proceeded therewith to the port of *Kingston-upon-Hull*, and into the said *Humber* dock; she there unladed part of the cargo into other vessels alongside, and she afterwards proceeded through the docks into the harbour, and there, within the port, delivered and landed the remainder of her cargo upon a quay belonging to Messrs. *Tomlinson* and *Newbald*.—Another sloop belonging to the Navigation Company, and called the *Blucher*, took her cargo at *Leeds*, and proceeded therewith to the port of *Kingston-upon-Hull*, came into the harbour, and there, within the said port, unladed her said cargo upon the last-mentioned quay, having, in the course of her voyage, passed through the entrance basin of the docks at *Goole*, without taking in any goods there.—In the fourth case the vessel took in her cargo at *Tomlinson* and *Newbald's* quay, in the port of *Kingston-upon-Hull*, and proceeded on her voyage to *Leeds* with such cargo, passing through the entrance basin of the docks at *Goole*. The plaintiffs demanded, in each case, a tonnage duty of 2*d.* per ton, which was refused.

None of the vessels were registered at *Goole* or elsewhere,

where, but the name painted on the steam-boat was "The *Eagle*, of *Goole*." Before the above-mentioned decision no tonnage or dock duties were charged on vessels going up or down the *Ouse* or *Trent*, to or from *Hull*, though all vessels paid wharfage when they came into the basin or docks and landed goods upon the quays there; and it was paid in the four cases above mentioned; it is a charge on the goods, and paid by the owner of them. Foreign-bound vessels, or vessels passing between *Grimsby* and *Hull*, have paid tonnage whenever they entered the harbour, basins, or docks, as well as any wharfage that might become due. The tonnage on *Grimsby* vessels is 2*d.* per ton. The dock dues are a charge on the register tonnage of the vessel, and are payable by the ship-owner. Vessels that only pass between *Hull* and *Grimsby*, or up or down the *Trent* and *Ouse*, to or from *Hull*, require no coasting or other custom-house papers, nor do they pay coasting duties. The tax on sea-borne coals, while in force, was levied by the custom-house officers at *Hull* upon coals brought coastwise from *Newcastle*; but none was levied on coals brought down the *Ouse* or *Trent*. The case was argued on this and a former day of the term.

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Alexander for the plaintiffs. It having been decided in the *Hull Dock Company v. Browne* (a), that *Goole* is not, for the present purpose, within the port of *Hull*, and *Goole* being itself a port, the vessels in question fall within the clause of 14 G. 3. c. 56. s. 42., which imposes a duty of 2*d.* per ton upon "every vessel coming to or going between the port of *Kingston-upon-Hull* and any port to the northward of *Yarmouth* in *Norfolk*, or any port to the southward of the *Holy*

(a) 2 B. & Ad. 43.

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Island." If it be said that the situation of *Goole* is inland; so is that of *London*; or if it be urged that there is another port between it and the sea, the same argument applies to *Hull* itself, which has *Grimsby* to the seaward. It is true *Goole* has been made a port since the passing of the dock acts; but they may extend to ports subsequently established, according to the doctrine in *Harrison v. Bulcock* (a) and *Downing College v. Purchas* (b). It may be said that, as vessels from *Goole* to *Hull* do not require custom-house papers, they are not contemplated in the forty-second section of 14 G. 3. c. 56., which requires payment of these duties to be made at the time of *entry inwards or clearance outwards*, or, if the ship should not enter, then at any time before she proceeds from the said port, at the *custom-house* there; and the same argument may be founded on section 49., which forbids officers of the customs to give any coquet or discharge, &c. to any vessel, until payment of the duties to the collectors or officers appointed to receive the same, and who are to give a receipt. But although particular methods of securing payment are pointed out in the case of vessels which take custom-house papers, it does not follow that other vessels are not liable to tonnage duty: and the words of section 42., "every ship or vessel coming into or going out of the said harbour," apply to all. The remedy in cases where the custom-house has jurisdiction may be cumulative, *Chapman v. Pickersgill* (c); and in these very cases, under the present act, a further remedy is provided, by distress, in section 47. *Grimsby* vessels do not take custom-house papers, yet they have always paid tonnage. And the same argument would exempt the vessels now in question from wharfage dues, which, by sect. 49., are put

(a) 1 H. B. 68.

(b) 3 B. & Ad. 162.

(c) 2 Wils. 145.

under

under the protection of the custom-house officers equally with tonnage duties; yet these vessels have always paid wharfage. It cannot be said that wharfage alone, in the case of these vessels, was intended to be the compensation for using the docks. Wharfage, by this act, is payable on the goods; it depends upon the rates of wharfage charged in *London*, and is paid to the respective proprietors of the quays or wharfs: tonnage is charged on the vessel; its amount is fixed, and it is payable to the Dock Company. The wharfage paid to the owners of private quays for landing goods can be no recompence to the company for the use of the docks. No argument arises from the non-payment of duty on coals brought down the rivers, for the act 6 G. 4. c. 107. s. 111. extended only to coals brought coastwise; and the plaintiffs do not contend that the vessels in question are coasting vessels. No difficulty arises from the non-registration of these vessels. The act does not require that the liability to tonnage should be estimated through that medium. Section 46. gives another mode of ascertaining it. The Dock Company have no control over the registration: and ships employed only in river navigation are not registered at all; nor are coasting vessels, if under fifteen tons burden: yet a vessel of that description coming, for instance, from *Lynn* to the *Hull* docks, would undoubtedly be liable to tonnage duty. The terms "entry inwards or clearance or discharge outwards," cannot be confined to the technical sense of entry or clearance at the custom-house. Vessels in ballast, or with passengers, would not clear at the custom-house, though they would certainly be liable to tonnage dues. In such cases the words "entry," and "clearance or discharge," must be taken in the more extended sense of entrance and departure.

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Secondly, if these vessels, or any of them, are not within the clause imposing 2*d.* per ton, they must then fall under the subsequent one, which imposes a duty of 6*d.* per ton on every vessel trading between the port of *Kingston-upon-Hull*, and any other *port or place in Great Britain, not before described*. The intention is clear to tax all vessels, except those in the king's service. If all or any of the vessels in question are of the number "*before described*," they come under the first clause, and are properly charged with the duty of 2*d.*; if not, they are chargeable with 6*d.* under the third.

Wightman, contra. There are three classes of vessels which the plaintiffs undertake to bring within 14 G. 3. c. 56. s. 42. First, those which load at *Goole* and discharge their cargoes in the Dock Company's basin at *Hull*. Secondly, those which load at *Leeds*, take in goods at *Goole*, and discharge at *Hull*. Thirdly, those which load at *Leeds*, and proceed to *Hull*, where they discharge, passing in the way through the entrance basin of the docks at *Goole*, but not taking in goods there (a). None of these are liable to the duty. As to the clauses relied upon in the forty-second section, it is true that *Goole* is, geographically, in a latitude north of *Yarmouth* and south of *Holy Island*, according to the strict sense of the first clause; but that clause evidently means only ports to the seaward of *Hull*. Conformably to this interpretation, the section goes on increasing the duty as the vessels go further outward: those which proceed to ports within the limits just referred to pay 2*d.*; those which go still further out along the east

(a) The fourth case (page 182. ante) was merely the third reversed.

coast are charged 3*d.*; and those which proceed to the west, or any other part of *Great Britain*, 6*d.* If it could be said that the first duty extended to places westward of *Hull*, vessels going to *Liverpool*, *Whitehaven*, or *Preston*, should be charged only 2*d.* And the argument that the vessels in question, if not within the first, are within the third clause, would lead to this absurdity, that a ship going to *London* would pay 3*d.*, to *Scarborough* 2*d.*, to *Goole* 6*d.* The direction, that payment shall be made at the time of the vessel's "entry inwards or clearance or discharge outwards," and the provisions of sect. 49. shew, that the duties were only considered applicable to vessels which come under the jurisdiction of the king's customer, not to those employed in inland navigation. It may be asked, why these should be wholly exempted. The legislature may not have taken them into consideration; or, it may have been thought that, as feeders of the trade of *Hull*, they ought to go free from these duties. The forty-fourth section is an exempting one, and does not extend the operation of the forty-second as against the parties to be charged. The provisions of sect. 44. apply to vessels coming or going to or from any place up the *Trent* or *Ouse*, from or to any port or place in *Great Britain* to the seaward of *Hull*; not vessels passing merely from *Leeds* to *Hull*. This appears from the word "coastwise," which always implies a voyage by sea between different parts of the kingdom, as described in 13 & 14 *Car. 2. c. 11. s. 7.*, (which prescribed regulations for the coasting trade, with reference to the customs,) where mention is made of goods which "shall be shipped or put on board, to be carried forth to the open sea from any one port, creek, or member in the kingdom of *England*,

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land, &c. to be landed at any other place of this realm."

It would be unreasonable to say that vessels coming from *Leeds* are subject to these duties, because they merely pass through the entrance basin of the *Goole* docks, when it is clear that vessels coming down the *Trent*, and which enter the *Ouse* at a lower point, are not chargeable with them.

Alexander in reply. Section 42. unequivocally imposes the duties on "every ship or vessel, the king's ships of war, and other ships and vessels employed in his majesty's service only excepted;" thus negating any other exception. Section 44., therefore, is not needed for that purpose: but it assists in explaining section 42.; and was relied on by Lord *Tenterden* for that purpose in *The Hull Dock Company v. Browne* (a). It shews that vessels employed in the river navigation are exempt from duty only so long as they do not use the docks, or incur liability in the other ways there specified. There is nothing in section 42. to confine the duty of 2*d.* to ports lying eastward of *Hull*. The *Aire* and *Calder* Navigation Company, in resisting payment of these dues, are in effect setting up a claim to use the plaintiffs' docks without making any compensation.

DENMAN C. J. I am of opinion that *Goole* comes within the description of a port on the east coast of *England*, to the northward of *Yarmouth* and southward of *Holy Island*; and that vessels loading there, and coming into the harbour, basin, or docks of *Kingston-upon-Hull*, are liable to the duty of 2*d.* per ton. As to the vessels not loaded at *Goole*, I have considerable

(a) 2 B. & Ad. 61.

doubt:

doubt: nor am I satisfied with the dilemma suggested, that they must either pay 2*d.*, as proceeding from a port north of *Yarmouth* and south of *Holy Island*, or 6*d.*, as proceeding from a "port or place not before described." It appears to me, that there are no words in the act to make them liable to either duty. If, before *Goole* was made a port, there was nothing to render them chargeable with the duty of 2*d.*, I think their merely passing through the entrance basin there, after loading at another place, cannot have that effect now. It is said, that if the duty of 2*d.* does not attach, that of 6*d.* must. But that would be so startling an anomaly, that I cannot bring myself to believe that it was intended. Some qualification must be imposed on the word "place," in the clause exacting this duty; giving it a signification analogous to that of "port," in the proper sense of the word, or considering it to mean a "place" on the coast. It is sufficient, at all events, to rely on the general proposition, that a tax must be imposed in distinct and unequivocal words. Here the vessels not loaded at *Goole* do not proceed from a port within the meaning of the clause giving a duty of 2*d.*; and the other clause is not distinct enough to enable us to say that the vessels come within that.

PARKE J. The questions in this case relate to two classes of vessels: the first, those which take in goods at *Goole*, and proceed from thence to *Hull*, and use the harbour or docks there; the second, those which begin or end the voyage at *Leeds*, merely passing through the entrance basin at *Goole*, in their way to *Hull*. Unquestionably, no duty can be claimed on any of these, but such as is distinctly given by the forty-second section

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tion of the statute. I think it is clear, that the vessels carrying goods to and from *Goole* are liable to the duty of 2*d.*: but I differ from my Lord Chief Justice on the other point; for I cannot distinguish between the two classes of vessels, and it seems to me that the Dock Company are entitled to the duties on both. As to the first class, construing the first and second rating clauses of section 42. together, it is clear that the duty of 2*d.* is imposed on every vessel trading between *Hull* and any port on the east side of *England*, north of *Yarmouth* and south of *Holy Island*: for the words in the second clause are, any port, &c. *on the east side of England, except as above.* There is an uncertainty in the words “port or place,” in the third clause, and, before *Goole* was made a port, I think they would not have included it; nor would they now include *Selby* or *Leeds*; for “place” must be something ejusdem generis with “port.” But, since *Goole* has been made a port, the case, as to that, falls precisely within the first clause. Undoubtedly the enactment applies to newly made ports as well as to others; and the application is reasonable, because those who use the docks ought to pay for doing so. As to the second class, if vessels sailing from the port of *Goole* are liable to duty, I think it attaches also, though they take their cargo at a place more inland. It is the same as where a vessel takes in goods at *Norwich* to go from *Lowestoff*. I cannot see why they should not be liable, at whichever place the goods are loaded. One reason for such a construction is, that, under this act, a greater tonnage is imposed in proportion as the ports are more distant, because vessels do not arrive so often at *Hull* from those ports: coming frequently from *Goole*, they yield a sufficient compensation, though the duty is less.

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port, or going between it and *Hull*, within the meaning of the first clause. Nor is the voyage to *Leeds* a trading between *Hull* and any "other port or place," within the meaning of the third clause; for "place" must be something ejusdem generis with "port;" that is, lying on the coast, and not situated internally, as *Leeds* is. I am therefore of opinion, that the duty attaches on the first two classes of vessels, but not on the last.

PATTESON J. Where a duty is claimed, those who seek to enforce it must shew some clear words by which the legislature has imposed it. With respect to the last two cases, I find no words in the 42nd section of this act, applying to the inland navigation between *Hull* and places up the river. I think it was clearly not intended to lay the duty on vessels going to and from such places, before *Goole* was made a port; and I cannot see why it should be demandable now because *Goole* is a port, and a vessel merely passes through the mouth of that port. If the vessel came from *Goole*, or took in her cargo or a part of it there, there are distinct words in the first clause applicable to that case, for *Goole* is a port, and is to the northward of *Yarmouth*, and southward of *Holy Island*. The argument for the plaintiffs went the length of contending that the words of that clause might include a port on the west side of *England*, as *Liverpool*; but that is going too far: the words can only apply to a port which has its sea-mouth (if I may so express it) on the east coast.

Judgment for the plaintiffs as to the first two vessels; for the defendants as to the last two.

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FRIEDLANDER *against* The LONDON Assurance Company. Wednesday,
Nov. 14th.

COVENANT on a policy of insurance against fire.

The declaration, after setting out the policy, stated that the plaintiff was interested in the goods thereby insured, to the amount mentioned therein, and that after the policy was effected, and while he was so interested, the said goods were destroyed by fire, &c. The defendants pleaded, among other things, that the plaintiff was not interested in the said goods to the said or any amount, and that the said goods were not destroyed by fire; and on these averments the parties went to issue. At the trial before Lord *Tenterden* C. J., at the *London* sittings after *Hilary* term 1832, the plaintiff called witnesses to shew that goods of considerable value had been sent in to him, on the premises in question, by various persons, before the fire happened. Among others one *Lewin Samuel Friedlander* was examined, for the purpose of proving that he (*L. S. Friedlander*) had sold and delivered certain goods to the plaintiff before the fire, and had, on that occasion, sent him an invoice and letter from *Edinburgh*, relating to such goods. The witness, on his examination in chief, when the invoice and letter were shewn to him, admitted that he wrote the invoice, but denied that he had ever sent the goods, and said

If a witness on a trial gives evidence against the interest of the party calling him, such party may bring other witnesses, not to discredit him generally, but to contradict him on the fact to which he has deposed, if it be material to the issue; not if it be merely collateral.

In an action upon a policy of insurance against fire, one issue was, whether or not goods of the plaintiff had been destroyed by fire as alleged in the declaration. A witness was called for the plaintiff, to prove that part of the goods were supplied to the plaintiff by him before the fire; but on being shewn an invoice and letter

relating to such goods, he stated that they were written by him, but that he never delivered such goods to the plaintiff; and he deposed that the letter (supposed to have been sent from *Edinburgh*) was written by him in *London*, at the desire of the plaintiff; that the invoice was drawn up by him (the witness) after the fire, in the presence of the plaintiff's son and shopman; and that the son and shopman persuaded him to state that the goods had been sent according to the invoice and letter:

Held, that the son and shopman, who had already been examined for the plaintiff, might have been called back to contradict all these statements.

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that the invoice was made out by him after the fire, in the presence of the plaintiff's son, and *Nathan* his shopman; that the letter was, in fact, written in *London*, at the plaintiff's house and by his desire; and that the plaintiff's son and shopman had persuaded him to say that he had sent the goods. It was then proposed, on the part of the plaintiff, to call the son and the shopman (both of whom had been examined before) to prove that the invoice was not made, nor the letter written, under the circumstances alleged, and that they had not acted in the manner stated by the witness. Lord *Tenterden* rejected the evidence, being of opinion that the plaintiff was not entitled to offer it, in contradiction to his own witness; and the jury found a verdict for the defendants. A rule having been afterwards obtained for a new trial,

Sir *James Scarlett*, *Campbell*, and *Kelly*, now shewed cause. The evidence was rightly rejected. The witness was called to prove that certain goods were sold and delivered to the plaintiff before the fire. To that extent, if his evidence was adverse, the plaintiff was at liberty to put in other testimony. But the questions which were put to him respecting an invoice and letter were clearly collateral to the matter in issue; to contradict the witness on those points could only have the effect of proving that he was unworthy of credit; and it is an established rule, that a party cannot take this course against his own witness. *Ewer v. Ambrose* (a), *Bradley v. Ricardo* (b), shew that a witness may be contradicted as to material facts by the party calling him, but not generally discredited. The evidence here offered could have no other tendency.

(a) 3 B. & C. 746.

(b) 8 Bingh. 57.

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Holt and *Follett* contra. It is true that evidence cannot be given to discredit a witness generally, by the party calling him. But if he has given evidence on a particular point contrary to expectation, and operating as a surprise on that party, other witnesses may be called to give different testimony as to the individual transaction, if it be, as in this case, not merely collateral, but important to the issue. [*Parke* J. The witness may be contradicted as to matters that are not purely collateral: the question is, whether that was the object here. To contradict the witness on a collateral fact would be only to discredit him in the same manner as if you proved that he had been guilty of a felony.] It is settled law, that although a party cannot bring evidence to discredit his own witness, he may to contradict him, if the fact be material to the issue. Here it was so. The plaintiff claimed damages for goods which he alleged to have been on his premises, and to have been destroyed by fire. The defendant denies that they were there at the time of the fire: the plaintiff asserts the contrary, and that they were, *bonâ fide*, purchased at a time previous to that event. The plaintiff might clearly have called another witness to prove that fact before he called *L. S. Friedlander*. But *Friedlander* is first called for this purpose, and a letter and invoice are put into his hands, which tend materially to shew that the goods were, *bonâ fide*, purchased. He denies that the drawing up of these was a genuine transaction. Then may not the plaintiff set up another witness named in his brief, and who might have been called before, to shew the real character of this letter and invoice? It may be said that the question as to the invoice is collateral only,

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because no act appears done by the plaintiff himself with respect to it. But the essential point was to shew that the document was not fabricated; no matter by whom. *Friedlander* asserted that it was fabricated by the plaintiff's son: it was material to establish, on the other hand, that the invoice was not fabricated with his concurrence, because, if it was his fraud or *Nathan's*, proof of that fact was as conclusive against the plaintiff as if it had been his own. The point of contradiction was one on which the whole issue turned; and the evidence given was not to affect a prior witness, but to prove a substantial and leading fact in the cause. If the son or shopman might have been examined as to this fact before *Friedlander*, why not after? It cannot be maintained, that because a witness has, by his statement out of court, deceived the party proposing to call him, he shall be enabled to preclude that party from giving the other evidence with which he was prepared, to the same facts. It was once supposed that a party could only give this contradiction where the witness was forced upon him by law, as the subscribing witness to a deed or will. But the more comprehensive rule is now clearly established. *Alexander v. Gibson* (a), *Ewer v. Ambrose* (b), *Bradley v. Ricardo* (c). In *Richardson v. Allan* (d), a witness called by the plaintiff to prove an indorsement denied the genuineness of the hand-writing, and Lord *Ellenborough*, though he thought the plaintiff could not prove the contrary by other witnesses, allowed the indorser to be called, because his testimony went to charge himself. But it is clear now, that if the indorser in

(a) 2 *Campb.* 556.(b) 3 *B. & C.* 746.(c) 8 *Bingh.* 57.(d) 2 *Stark. N. P. C.* 334.

such

such a case had been first called and denied the writing to be his, the plaintiff might still have brought forward his other witnesses to prove the contrary.

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PARKE J. There is no dispute in this case as to the law; the application of it only is in question. It is clear that a party may contradict his own witness if he speaks to a material fact in the case, against the interest of those who called him. On a collateral fact he cannot be contradicted, not only because such evidence goes to the credit of the witness, but because a multiplicity of issues ought not to be introduced. Now here the conduct of the plaintiff himself in directing the letter to be written was clearly a material fact, on which the witness might be contradicted. On the point as to the invoice, I thought at first that the acts of the plaintiff's son and shopman were not so pertinent to the case as to admit the contradictory testimony. But I am now of opinion that those acts were not collateral, because it was material to the issue to shew that the invoice existed before the time of the fire, and was a genuine document. The evidence, therefore, ought to have been received.

TAUNTON J. concurred.

PATTESON J. The whole question is, for what purpose it was proposed to call back the witnesses, who had already been examined. The law is clear, but there is a good deal of difficulty in the application. I had a doubt at first, whether the plaintiff's son and shopman could be called to contradict a witness who stated that the invoice had been fabricated by him in their presence, and that they had persuaded him to say that the

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goods were sent conformably to the letter and invoice. It struck me that this would have been offering contradiction on a collateral point. But I am satisfied that the evidence on these facts was admissible, on the ground that they were not collateral, but material to the issue; and the genuineness of the letter was clearly a material question in the case. The rule will therefore be absolute.

DENMAN C. J., having been counsel in the cause, gave no judgment.

Rule absolute.

Thursday,
 Nov. 15th.

Ex parte CORDING.

The pawn-broker's act, 40 G. 3. c. 99. s. 24., enables justices in case it shall be proved before them that any goods pawned have been sold contrary to the act, or have been embezzled or lost, or are become or have been rendered of less value than at the time of pawning, through the default, neglect, or wilful misbehaviour of the person with whom the same were pawned, to award satisfaction to the owner, as there specified :

IN obedience to a writ of habeas corpus, the governor of the House of Correction in *Cold Bath Fields* brought the above party before the Court, and returned, as the cause of his being taken and detained, the following warrant of commitment : —

“ To all constables and other peace officers of the county of *Middlesex*, and to the governor of the House of Correction at *Cold Bath Fields* in the said county.

“ Whereas, on the 2d day of *October* 1832, *George Courtney*, of, &c. Gentleman, informed me, *William Ballantine*, Esq., one of his Majesty's justices of the

peace

Held, that justices have no power, in the above cases, to commit in default of such satisfaction being made.

Quære, Whether a pawnbroker is answerable for pledges destroyed by accidental fire, as goods “lost” within the above clause.

Semble, that the words “through the default,” &c. apply to all the cases previously mentioned, and not only to that of the goods pawned having become of less value.

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peace for the said county of *Middlesex*, that on the 11th day of *January* in the year aforesaid he pawned one gun, of which he was the real owner, for securing the sum of 21s. lent thereon by *John Masheder Cording*, of the parish of *St. George* in the said county, pawnbroker, and the profit thereof; and that the said *G. Courtney* had, within the space of one year after the pledging of the said gun, to wit, on the 28th day of *September* in the year aforesaid, duly tendered unto the said *J. M. C.* the said sum of 21s., the principal money borrowed upon the said gun, and the profit due to the said *J. M. C.*, according to the table of rates established by the act of parliament in such case made and provided, and thereupon demanded and required the said *J. M. C.* to deliver back the said gun to the said *G. Courtney*; but that the said *J. M. C.* did, on the said 28th day of *September* in the year aforesaid, at, &c. unlawfully, and without shewing reasonable cause for so doing, neglect and refuse to deliver back the said gun to the said *G. Courtney*; and whereas the said *J. M. C.* appeared before me, the said justice, on the 2d day of *October* in the year aforesaid, at the *Thames* Police Office, in the parish, &c.: and I, the said justice, proceeded to examine on oath, in the presence and hearing of the said *J. M. C.*, the said *G. Courtney*, and also one *Charles Young*, a credible witness, touching the premises, and he produced before me the note or memorandum which had been given by the said *J. M. C.* upon the pledging of the said gun, according to the direction of the act of parliament in such case, &c., and proved a tender of the principal money due, and all profit thereon, to have been made as aforesaid to the said *J. M. C.*, within the said space of one year after the pledging of

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the said gun, whereupon the said *J. M. C.* stated that the said gun had been destroyed by fire on his premises : and whereas, upon due consideration had thereof, it appeared to me, the said justice, that the said gun had been lost by the said *J. M. C.*, and I did thereupon, by a certain order under my hand and seal, bearing date the said 2d day of *October*, &c., allow and award the sum of 3*l.* and 9*s.*, to be a reasonable satisfaction to the said *G. Courtney*, for or in respect of the said gun, and did order the said *J. M. C.* forthwith to pay the said sum of 3*l.* and 9*s.* to the said *G. Courtney*, according to the form of the statute, &c. : and whereas it appeareth to me, the said justice, on the oath of the said *G. Courtney*, that the said *J. M. C.* having had due notice of my said order, hath unlawfully neglected and refused to pay the said sum of 3*l.* and 9*s.* to the said *G. Courtney* as a satisfaction for and in respect of the said gun : these are therefore to will and require you, the said constables and peace officers, forthwith to apprehend and convey the said *J. M. C.* to the said House of Correction ; and you, the said governor of the said House of Correction, are hereby authorized and required to receive the said *J. M. C.* into your custody in the said House of Correction, and him therein safely to keep without bail or mainprize, until he shall pay the said sum of 3*l.* and 9*s.*, the amount of satisfaction which I, the said justice, have adjudged to be reasonable for the value of the said gun so lost as aforesaid to the said *G. Courtney*, or be otherwise discharged by due course of law. Given," &c.

Sir *James Scarlett*, and *Follett*, now moved that the party should be discharged. This is a commitment under the pawnbrokers' act, 39 & 40 G. 3. c. 99. The sections

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that a commitment in execution, to be valid, must be preceded by a conviction; *Rex v. Rhodes* (a); it should appear that both sides were heard, and that there was a regular adjudication. This clause expressly speaks of the county or “place wherein the offender shall reside or be convicted;” and in section 35. an appeal is given to persons convicted of any offence punishable by this act: but if a party may be committed in execution by an order, the appeal in that case is taken away. Now, upon the present return, it only appears that certain facts are sworn to by two parties before the justice, and he makes an order; and then, it appearing to the justice on the oath of one of the original complainants that the party has not obeyed the order, for that offence the justice orders him to be imprisoned. There is no hearing of both parties; no adjudication or conviction. Secondly, it is clear from the whole of the fourteenth section, that it was meant to apply to cases where the pawnbroker wilfully and perversely withheld, and refused to account for that which it was in his power to deliver up: but here, it appears by the order that the pawnbroker states the gun to have been destroyed by fire; and upon that the justice finds, on consideration, that the gun is lost, and orders satisfaction to be made. Besides, according to this clause, before the order is made, there should be a tender of the principal money and profit by the borrower to the lender before the justice; and this does not appear by the present order to have taken place. Nor is the return supported by the twenty-fourth section (b).

That

(a) 4 T. R. 220.

(b) Sect. 24. “And be it further enacted, That if, in the course of any proceedings before any justice or justices of the peace, in pursuance of or under this act, it shall appear, or be proved to the satisfaction of the justice

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be in respect *thereof or of such damage* ; thus applying to every case before mentioned. In the present order no default is charged. And the twenty-fourth section, though particular in its provisions, gives no power to commit. Nor can it be coupled with the fourteenth, in order to give that power. If they could be so construed together, a party might proceed, under section 14., to recover satisfaction for goods expressly alleged by him to be lost; which is contrary to the whole tenor of that section. Besides, under section 24., the loss should be proved on oath, and the order does not allege that to have been done.

Campbell, contra. The act is certainly obscure, but sections 14. and 24., taken together, support this order. The question is, whether a pawnbroker, in consideration of the high interest he receives, is not liable to the parties who deposit goods with him, if they are lost, though by accidental fire? [*Taunton J.* The contrary appears from *Coggs v. Bernard (a)*.] That is at common law. But here a statutable liability may be imposed, on account of the high premium received, the necessity of protection to the pawner, and the power which a pawnee now has of securing himself by insurance. The order in this case was not bad for want of a conviction. *Rex v. Rhodes (b)* was a case on the vagrant act, and a conviction was necessary there; but an order for payment of money may be made without a conviction. The fourteenth section requires a summons and examination of the parties on oath only in the first stage of the proceeding; if the order then made is not

(a) 2 *Ld. Raym.* 916.(b) 4 *T. R.* 220.

complied

complied with, nothing further is necessary, but the justice is authorized and required to commit. This is in the nature of a *ca. sa.* It is objected that the order does not shew any tender of principal and profit before the justice. That is necessary where the proceeding is on section 14.; it may, however, be admitted that the present order cannot be grounded on that clause alone, but proceeds on section 24. coupled with it. The first empowers the justice to order that the goods shall be delivered up; the second directs what shall be done if they are not forthcoming, or have been lessened in value. [*Parke J.* If it appear on oath that they have been embezzled, lost, or damaged.] The words are, “if it shall appear, or be proved on oath.” The justice may state it at his own peril, without oath made, otherwise the alternative, “if it appear,” would be superfluous. The words “by or through the default,” &c. apply only to the immediately preceding clause, if the goods “are become, or have been rendered, of less value.” In the case of pledges improperly sold, or embezzled, such words would be an unnecessary addition. [*Patteson J.* The words “satisfaction in respect *thereof*, or of such damage,” must extend to all the cases; otherwise what compensation is provided, in case of loss for instance?] The fourteenth and twenty-fourth sections must be taken together: there is otherwise no effectual remedy where the goods are lost, embezzled, or sold. The pawnee, under the two sections, may be ordered to deliver up the goods, or, if lost, &c. make satisfaction for them; and in every case he may be committed in default. [*Patteson J.* Sect. 14. speaks of the article “continuing redeemable.”] That only means, if the time for redemption has not expired.

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DENMAN C.J. No subject of the king is to be restrained of his liberty without a good legal warrant for his imprisonment. Here no such warrant is shewn. Many objections have been taken to the commitment, and I am not inclined to say that any one of them is bad. But it is sufficient to select one which is clearly good, namely, that by the twenty-fourth section no power of commitment is given, assuming that the loss here in question was of the kind contemplated in that clause. It would require strong proof to convince me that the same power was meant to be given in the cases there mentioned as in that of the contumacious detention contemplated by section 14. The objects of the two clauses are very different; and, at any rate, we are not to imply a right to take away liberty. I have the greatest doubt whether the magistrate, in this case, formed a right conclusion, when he held that the goods were lost within the meaning of the twenty-fourth section; but it is unnecessary to decide that, because, if his finding was right, still the power of commitment is not given in such a case. The party must, therefore, be discharged.

PARKE J. I am of the same opinion. It is unnecessary to enter into any other objection than that which my Lord has adverted to, namely, that, under the twenty-fourth section, we cannot see clearly that any power is given to justices to commit in default of payment for goods that have been lost. We are not at liberty to import the power of commitment from the fourteenth section into the twenty-fourth. In the case provided for by the former section, the party has it in his power to deliver up the goods; it may be reasonable there

there that the justice should have authority to commit, and perhaps without first convicting. But it is very different to say that, where goods have been lost, the party failing to make satisfaction shall be immediately committed. We ought, at least, to see by very clear words, that such a power is given before we enforce it. I desire not to be considered as assenting to the doctrine stated in argument, that a pawnbroker is liable under the statute for the loss of a pledge by accidental fire.

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TAUNTON J. I am also of opinion, that this warrant cannot be supported; and that the power of imprisonment, given by the fourteenth section of this act, is not to be carried on to the twenty-fourth. I have also a strong opinion, that the words in the latter section, “by or through the default, neglect, or wilful misbehaviour of the person with whom the same were so pledged or pawned,” must refer to the word “lost;” that a loss, therefore, is not within the meaning of the section, unless it happen by the default of the pawnbroker; and, consequently, that a loss by accidental fire is not contemplated. The language of *Holt C.J.*, in *Coggs v. Bernard*(a), shews what the common law would be on the subject, and affords a key to the intention of the legislature in this statute. I do not think it was intended by the act to extend the liability of pawnbrokers, in this respect, beyond what it was at common law. But I only throw out this as my present opinion; not meaning to lay it down judicially, or to be bound by it hereafter.

PATTESON J. I am perfectly satisfied that the twenty-fourth section does not authorize the justice to commit;

(a) 2 *Ld. Raym.* 916.

and

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and I think there is great weight in the other objections.

We cannot incorporate the two sections, and take it by implication that a power of imprisonment is given by the latter as well as by the first. It seems to me clear, that section 24. was not intended to give the powers of section 14. in cases of loss; because the former section provides, that where the goods are damaged, it shall be sufficient for the pawner to pay the amount of principal and profit, deducting such reasonable satisfaction in respect of damage as the justice shall award: and *upon so doing* the justice shall proceed as if the pawner had paid or tendered the whole money due for principal and profit: but in the other cases under that clause the provisions are different. Section 14. contemplates an alternative in the party's power, to make satisfaction or to deliver the goods; and the power of committal seems confined to the case of a wilful refusal to do either one or the other. I am consequently of opinion, that this warrant is bad.

The party was therefore discharged out of custody.

Saturday,
Nov. 17th.

The KING *against* The Inhabitants of PADSTOW.

On the trial of
an appeal
against an
order of re-
moval, the
respondents
having proved,
by parol, the
renting of two
fields in the appellant parish, at 15*l.* a year, and an occupation and payment of the rent for a whole year, the appellants then gave evidence, that the contract for taking the two fields was reduced into writing: Held, that it lay upon the latter to produce the written contract.

ON appeal against an order of two justices, whereby
Mary Ann Old and her children were removed
from the parish of *Little Petherick*, in the county
of *Cornwall*, to the parish of *Padstow* in the same

3 Bac. 332.
1 Phill. 221.

county,

county, the sessions confirmed the order, subject to the opinion of this Court on the following case: —

In support of the order of removal the respondent parish (*Little Petherick*) proved by parol evidence that, in the year 1828, the pauper's husband, *Martin Old*, who is now living in *America*, rented two fields in the parish of *Padstow*, of *J. A. Corkhill*, at 15*l.* a year; that he occupied and paid the rent agreed on for the same for two years, viz., from *Michaelmas* 1828 to *Michaelmas* 1830; and that, during the first year of such tenancy and occupation, he resided in *Padstow* forty days and upwards. For the appellant parish a witness was called, who stated that he had been a clerk of *Corkhill* (who has since become a bankrupt); that he was present in 1828 when *Martin Old* took the fields in question of his master, and that the conditions of taking were reduced into writing, and signed by the parties on unstamped paper. Upon this evidence, the court of quarter sessions confirmed the order, subject to the opinion of this court, whether they were justified in so doing, or whether, erasing the evidence previously given on the part of the respondents, and rescinding the conclusion which arose from that evidence, they ought to have quashed the order of removal.

Coleridge in support of the order of sessions. The respondents having proved, by parol, a taking of the premises in 1828, and it then appearing, from the appellant's witnesses, that there had been an agreement in writing, it lay upon the latter to produce that agreement, *Stevens v. Pinney* (a), *Rex v. Rawden*. (b) The rule upon the subject is thus laid down by *Tindal* C. J., in *Fielder v.*

(a) 8 Taunt. 327.

(b) 8 B. & C. 708.

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ants of
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ants of
PANDROW:

Ray (a): “If it appear by the testimony of the plaintiff’s witness, (that there is a contract in writing,) the absence of the writing is an inherent defect in his case, which it is incumbent on him to get over; whereas, if it appears from the defendant’s witness, it is an objection which the defendant must substantiate by the production of the instrument in the regular way: otherwise, this inconvenience might follow, — that the plaintiff might, on a mere assertion of the defendant, be nonsuited for the non-production of a written instrument, which, if it had been produced, might turn out not to apply to the contract in question.” [*Denman C. J.* The rule undoubtedly is, that where a party has made out a *prima facie* case, and the opposite party attempts to cut it down by a written instrument, he must prove it.]

Follett contra. In order to gain a settlement by renting a tenement, the 6 G. 4. c. 57. requires that it should be hired for a year, at a rent of 10*l.* This statute, therefore, renders it necessary to prove the contract itself; and if that be so, and it appear in the course of the case that there is a contract in writing, the party who seeks to establish the settlement must prove that contract. [*Parke J.* The rule is very clearly settled, that if it comes out on the cross-examination of the plaintiff’s witnesses that there is a written instrument, he must produce it; but if he makes out a *prima facie* case without shewing that there was any written contract, the other party, if he relies on that written contract, must produce it.]

Per Curiam. The order of sessions must be confirmed.

Order of sessions confirmed.

(a) 6 *Bingh.* 335.

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The KING *against* The Inhabitants of
MATTERSEY.

Saturday,
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ON appeal against an order of two justices, whereby *William Green Otter* was removed from the parish of *Kettering*, in the county of *Northampton*, to the parish of *Mattersey*, in the county of *Nottingham*, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

Elizabeth Otter, the mother of the pauper, lived with one *William Green*, in the parish of *Mattersey*, for eight years, in the course of which time she was delivered of two children, both illegitimate, of whom the said *William Green* was the putative father. The pauper *W. G. Otter* was one of them, and was born at a place known by the name of the *Lodge-on-the-Wolds*, an extra-parochial place, not maintaining its own poor. The mother of the pauper was sent there by the said *William Green*, her master, when she was far advanced in her pregnancy, in order to prevent the said *W. G. Otter* from being born in the appellant parish. The said *W. Green* was proprietor and occupier of a considerable quantity of land in the said parish. He had never, in the presence or to the knowledge of the said *Elizabeth Otter*, spoken to the parish officers on the subject of removing her to the *Lodge-on-the-Wolds* for the purpose aforesaid. She returned to the house and service of the said *William Green* as soon as she was sufficiently recovered, namely, in six weeks after her confinement, the expenses of which, and also of her maintenance

If a woman 2. 5 6d - 2 3 3
pregnant of a 2. 5 6d - 2 3 3
bastard be 2. 5 6d - 2 3 3
fraudulently 2. 5 6d - 2 3 3
removed by 2. 5 6d - 2 3 3
parish officers,
for the pur-
pose of pre-
venting the
bastard from
becoming
chargeable to
their parish,
the child is
settled in the
parish from
which the
mother was
so removed;
but not if the
mother be so
fraudulently
removed by a
parishioner
liable to pay
rates, not being
a parish officer.

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during her stay at the *Lodge-on-the-Wolds*, were paid by the said *William Green*.

Miller in support of the order of sessions. If the child had been born in a parish under the circumstances stated in this case, the settlement would be in the parish from which the woman was sent; and, secondly, if that be so, the place of birth being extra-parochial makes no difference. The general rule is, that a bastard is settled in the place of its birth. There are some exceptions to that rule, and one is where a woman with child of a bastard is removed out of one parish to another by fraud or collusion; and then the child, wherever it is born, is settled in the parish from which the mother has been collusively removed. [*Denman C. J.* That is where the fraud or collusion is by the parish officers; here it was the fraud of a private individual.] In *Tewksbury v. Twynning* (a) it is stated only that the woman being with child, by practice was conveyed out of the parish of *Twynning*; it does not appear that it was by the practice of the officers of that parish. It is sufficient if the practice be by any of the parties who would be burdened by the child becoming chargeable to the parish from which the mother is removed. In *Rex v. St. Nicholas, Leicester* (b), *Bayley J.* states it as an exception to the general rule that an illegitimate child is settled in the parish where it is born, if the mother of the child is removed out of one parish into another through the fraud or collusion of the officers. But that was not the point there decided; and there is no authority to shew that the fraud must be by the parish officers. [*Parke J.* *Mr. Nolan* (c) states, that the re-

(a) *Bulst.* 349.(b) 2 *B. & C.* 891.(c) Vol. i. p. 524.
moval

moval must be by the fraud or collusion of the parish officers; and for that cites *Tewksbury v. Twynning (a)*, and *Masters v. Child (b)*.] *Masters v. Child* does not support that position.

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Waddington (and *Park* was with him), *contra*, was stopped by the Court.

DENMAN C. J. The general rule is, that an illegitimate child is settled in the parish in which it is born. Unless this case, therefore, comes within some of the exceptions to that rule, *W. J. Otter* would be settled in the place of his birth, if it were not extra-parochial, and certainly not in *Mattersey*. It is said; that he is settled in *Mattersey*, because the mother, when pregnant, was fraudulently removed from that parish by a parishioner liable to pay rates there. But I think it may be collected from *Tewksbury v. Twynning (a)*, and *Masters v. Child (b)*, that in order to fix the settlement of an illegitimate child in the parish from which the mother has been fraudulently removed, the fraudulent removal must have been by the parish officers. Here that was not so. No case has gone so far as to shew that if the fraud be by an individual, not a parish officer, the child shall be settled in the parish where the fraud was committed.

PARKE J. concurred.

TAUNTON J. It does not appear by the statement in the case, that the mother of the pauper was settled in the parish of *Mattersey*. It is merely said that she lived there. In *Masters v. Child (b)*, it is stated that if a woman being with child of a bastard, and settled in one

(a) 2 Bulst. 349.

(b) 3 Salk. 66.

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parish, is persuaded by the parish officers to go into another, and there to be delivered, this fraud will make the parish chargeable where the mother was settled, though the child was not born there. But if the woman *accidentally come into a parish*, and is persuaded *by some of the parishioners* to go into another, which she doth, and there is delivered, this shall not charge that parish which persuaded her. That is precisely in point. Here the mother of the pauper was persuaded by one of the parishioners to go to an extra-parochial place. Independently of that decision, I should have been bold enough to come to the same conclusion. The general rule is, that an illegitimate child shall be settled in the place where it is born; and the fewer exceptions there are to that rule, the better.

PATTESON J. concurred.

Order of sessions quashed.

Saturday,
Nov. 17th.

The KING *against* The Inhabitants of ORMESBY.

In 1827 a cottage and land were hired for a year, at the rent of 11*l.* 10*s.*, and it was agreed that the land should be entered on at Lady-day 1827, and held till Lady-day 1828, and the cottage entered on at May-day 1827, and held till May-day 1828. The land and cottage were occupied for a year respectively, commencing and ending at the days agreed on, and the rent paid: Held, that that was an occupation of a tenement for one whole year, sufficient to give a settlement under the 6 G. 4. c. 57.

UPON appeal against an order of two justices, whereby *William Milestone*, his wife and children, were removed from the township of *Stokesley* to the township of *Ormesby*, both in the North Riding of *Yorkshire*, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

About *Candlemas* 1827, the pauper, being legally settled in *Ormesby*, took of one *Emerson* a cottage and

some

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ants of
ORMESBY.**

DENMAN C. J. This question depends on the statute 6 G. 4. c. 57.; which enacts "that no person shall acquire a settlement by reason of settling upon, renting, or paying parochial rates for any tenement, unless such tenement shall consist of a separate and distinct dwelling-house or building, or of land, or of both, bonâ fide rented by such person, at and for the sum of 10*l.* a year at the least, for the term of one whole year; nor unless such house or building, or land, shall be occupied under such yearly hiring, and the rent for the same, to the amount of 10*l.*, actually paid for the term of one whole year at the least." Now here the tenement did consist of separate and distinct building and land; they were bonâ fide rented for 10*l.* The question is, whether it was occupied for one whole year? the house and land were occupied under the yearly hiring, and each of them was for the term of one whole year. The words of the statute are therefore satisfied.

PARKE, TAUNTON, and PATTESON, Js., concurred.

Order of sessions quashed.

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Nov. 17th.*

**The KING *against* The Inhabitants of OSSETT-
CUM-GAWTHORPE.**

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- 165

ad 7:06

A. agreed to become the hired servant of *B.* for five years, to do such work as

belonged to the finishing of cloth, and *B.* promised to pay to *A.* 10*s.* a week for the first two years, 11*s.* for the third, 12*s.* for the fourth, and 13*s.* for the fifth, the hours of working to be from six in the morning till seven in the evening, to be paid for all over-time, and a deduction to be made for all short: Held, by *Denman C. J., Parke,* and *Patteson Js., Taunton J.* dissentiente, that this was not an exceptive hiring, but a hiring for five years *absolutely.*

ON appeal against an order of two justices for the borough of *Leeds*, in the *West Riding* of the county of *York*, whereby *George Clarke*, his wife and child, were

removed

removed from the township of *Leeds* to the township of *Ossett-cum-Gawthorpe*, in the said Riding, the court of quarter sessions confirmed the order, subject to the opinion of this Court on the following case. The pauper was born in *Ossett-cum-Gawthorpe*, and a hiring under the following agreement, and service for the time therein mentioned, in the respondent township, were admitted : —

“ Memorandum of an agreement made and concluded this 25th day of the fourth month, 1826, between *J. and T. Walker* of *Leeds*, cloth merchants, on the one part, and *G. Clarke*, with the consent of his father, on the other part ; the said *G. Clarke* doth agree to become the hired servant of *J. and T. Walker*, for the term of five years, to do such work as belongeth to the finishing of cloth, and to take any part of work the said *J. and T. Walker* shall think proper, and do the same to the best of his knowledge justly and faithfully ; this being done, the said *J. and T. Walker* promise to pay unto *G. Clarke* ten shillings per week for the first two years, and eleven for the third, and twelve for the fourth year, and thirteen for the fifth and last year ; the hours of working to be from six o'clock in the morning until seven o'clock in the evening, and to be paid for all over-time, and a deduction to be made for all short, either in sickness or in health. The question for the opinion of this Court was, whether *G. Clarke* gained a settlement in *Leeds* by such hiring and service.

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OSSETT-CUM-
GAWTHORPE.

Milner and *Baines* in support of the order of sessions. To gain a settlement by hiring and service, the servant must be under the control of the master for the whole year. Here the pauper was not under the control of his master from seven o'clock in the evening to six o'clock

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 ants of
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 Gawthorpe.

o'clock in the morning; and, if that be so, this was an exceptive hiring. This case must be governed by *Rex v. Birmingham* (a), and *Rex v. Frome Selwood* (b). In the first of these cases the pauper was hired for a year, at the wages of 4s. 6d. a week, to work from six in the morning till seven in the evening, with liberty *to make as much over-work as he chose*; and it was held to be an exceptive hiring, although *Rex v. Byker* (c) was pressed upon the attention of the Court. In *Rex v. Frome Selwood* (b), the pauper was hired for three years to work as a bedstead maker; in summer from six in the morning till seven in the evening, and in winter from seven in the morning to eight in the evening; and he was not to work for or serve any other person; and that was held to be an exceptive hiring. The present is a stronger case; for there it was agreed that the servant should not work for any other person; here there is no such stipulation; and the pauper could not be compelled to work more than thirteen hours a day. In *Rex v. North Nibley* (d), a service under a hiring for five years, to work as a colt shearer for twelve hours each day, was held to be an exceptive hiring. [Parke J. The sole question in this case is, whether, by the terms of the contract, the servant was compellable to work for his master during the over-hours, on receiving compensation? In *Rex v. Birmingham* (a), it was optional in the pauper to do over-work or not.] So here, the stipulation that the pauper was to be paid for all over-time, shews that it was optional in him to work or not, during the over-hours, for his master.

(a) 9 B. & C. 925.

(c) 2 B. & C. 114.

(b) 1 B. & Ad. 207.

(d) 5 T. R. 21.

Blackburne

Blackburne and Sir *G. Lewin* contra. The legal effect of the contract is, that the pauper undertakes to give the whole of his services for five years to his master. This case is distinguishable from *Rex v. Birmingham*, because there it was optional in the pauper to work over-hours or not; and from *Rex v. Frome Selwood*, because there the pauper was not entitled to compensation if he worked over-hours, and consequently the contract might be considered as one for the specified hours only. This case must be governed by *Rex v. Byker (a)*. There the pauper was hired for a year as a driver in a colliery, at the wages of 1s. 10d. for a good day's work, not exceeding fourteen hours, and 2d. a day more when that time was exceeded; and it was contended that the pauper was entitled to absent himself at the expiration of fourteen hours, and that the master could not compel him to work any longer. But *Bayley J.*, in delivering the judgment of the Court, said, that the time was only mentioned as the measure of the wages; that the contract did not impose any limit upon what might reasonably be required by the master; and that the relation of master and servant continued during the whole twenty-four hours. That applies precisely to the present case. Here, in the early part of the agreement, the pauper contracts to serve absolutely for five years. Then follows a stipulation by the master to pay weekly wages, varying in amount from year to year, and then, lastly, the clause specifying the number of working hours. That is manifestly introduced only to explain the number of hours the pauper was to work for those specified weekly wages; he was bound by the first

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(a) 2 B. & C. 114.

clause

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clause in the contract to give his whole services to his master during the five years; by the last clause the master was to pay him increased wages if he worked beyond the specified number of hours. At all events, the first clause in the agreement, whereby the pauper contracts absolutely to serve for five years, is free from all ambiguity; if it be said that the meaning of the subsequent clause, specifying the number of working hours, is doubtful, and may or may not refer to the early part of the agreement, so as to limit the time during which the pauper was to be bound to work for his master; then, according to *Hopkins v. Thorogood*(a), the first clause being clear, ought not to be controlled by the second, which is ambiguous.

DENMAN C. J. It is impossible to decide this case without interfering with some former decisions, but, upon the whole, I think that this was not an exceptive hiring. The pauper agreed to become the hired servant of *J. and T. Walker* for five years, to do such work as belonged to the finishing of cloth. If the agreement had stopped here, there would clearly have been a contract to serve for five years, and the masters would have the right to command all the services of the pauper during that period. The question is, if there be any clause in the subsequent part of the agreement which clearly takes away that right? The masters promise to pay the pauper weekly wages, varying in amount yearly during the whole five years. Then comes a clause in these words; “the hours of working to be from six o’clock in the morning until seven o’clock in the evening,

(a) 2 B. & Ad. 916.

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and to be paid for all over-time, and a deduction to be made for all short, either in sickness or in health." There is nothing here to shew that it was in the option of the pauper to work or not for the master in over-hours; and if not, then the right given to the master in the early part of the agreement, to all the services of the pauper, is not taken away. I think this was a complete bargain for all his time, and that there was not any part of that time during which the pauper could lawfully refuse to work for his master.

PARKE J. I am of the same opinion. I think there was no period of the day when the master could not lawfully command the services of the pauper. The true way to ascertain whether this be an exceptive contract or not, is, to consider what would have been the situation of the parties, if there had been an extraordinary demand for work, and the master had called on the pauper to work during over-hours. Could he have refused? The words of the contract are, "that *G. Clarke* agrees to be a hired servant for the term of five years, to do work," &c. That is the stipulation as to working, or to the service to be performed. Then the contract goes on to fix the weekly wages to be paid from year to year by the masters. Then come the words on which the difficulty arises;—"the hours of working to be from six o'clock in the morning until seven o'clock in the evening, and to be paid for all over-time." Those words seem to me to be a qualification of the sentence which immediately precedes them, and which fixes the amount of weekly wages; if that be so, then the case is like *Rex v. Byker (a)*. It is distinguishable from *Rex v.*

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(a) 2 B. & C. 114.

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Birmingham (a), because, there, the pauper might, at his election, have worked or not for his master at over-hours. In *Rex v. Frome Selwood (b)*, the limitation as to the working hours immediately followed the stipulation for service. Here, between that clause and the one specifying the number of hours the pauper was to work, the clause intervenes, fixing the amount of weekly wages. It appears to me that the pauper could not lawfully refuse to work for his master during the over-hours (if required so to do), but that the latter was entitled to the whole services of the pauper during the five years, and consequently this was not an exceptive contract.

TAUNTON J. The cases undoubtedly run very near to each other. Certainty in sessions law is very important, and I am sorry therefore I cannot come to the same conclusion as my Lord Chief Justice and my brother *Parke*. This case appears to me not distinguishable from *Rex v. Birmingham (a)* and *Rex v. Frome Selwood (b)*, and they being the latest cases on this subject, ought to govern this. It is said that in *Rex v. Birmingham (a)*, the pauper was to do over-work only if he chose. Looking at the terms of the present contract, I think it was optional in the pauper here also to work over-hours or not. The hours of working are defined to be from six o'clock in the morning till seven in the evening. I cannot see why this limitation of the hours of working was introduced, unless it were as an exception in the contract. It is said that it refers only to the amount of wages: I think it refers to the time of working as well, and that the pauper might have refused to extend

(a) 9 B. & C. 925.

(b) 1 B. & Ad. 207.

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his time of service beyond those hours; and then it is not distinguishable from *Rex v. Birmingham* (a), nor can I distinguish it from *Rex v. Frome Selwood* (b). It does not signify much in what part of an instrument a particular stipulation occurs, unless it be so placed as necessarily to qualify only the words immediately preceding. Now I cannot consider this clause a mere regulation of wages, but I think it also limits the time of work. Without wishing to multiply distinctions in a branch of the law in which they are already too abundant, I must add that the present is the case of a servant hired to perform manufacturing work, and it is well known that exceptive contracts are extremely frequent on such occasions. This may in some degree furnish a key to the meaning of the parties, and assist in explaining their intention; and in affirming the order of sessions, I think we should not only fall in with the last two cases, but also with the general current of authorities.

PATTESON J. I am of opinion that a settlement was gained. *Rex v. Byker* (c) and *Rex v. Frome Selwood* (b) turn on very nice distinctions. The question in this case is, whether the pauper was bound to serve more than the number of hours mentioned in the agreement? I thought, for a considerable time, that the case fell within *Rex v. Frome Selwood* (b); but, looking at the terms of the contract, and the place in which the stipulation as to the number of hours occurs, I think that it was introduced merely to regulate the wages; and that the pauper could not refuse to work for his master beyond those hours. I feel great difficulty in distin-

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guishing one case from the other; but, upon the whole, it seems to me that the present falls within *Rex v. Byker* (a).

Order of sessions quashed.

(a) 2 B. & C. 114.

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The KING against The Inhabitants of PENRYN.

Between the
passing of
35 G. 3. c. 101.
and that of
6 G. 4. c. 57.,
a settlement
might be
gained by
reason of a
party being
charged with
and paying his
share towards
the public
taxes or levies
of the parish,
in respect of a
tenement above
the value of
10*l*.

ON appeal against an order of two justices, whereby *Honour Gill*, widow, and her three children, were removed from the parish of *Budock* to the borough of *Penryn*, both in *Cornwall*, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

In 1815 *Henry Gill*, the deceased husband of the pauper, took of Mr. *Edgcome* a tenement, consisting of three rooms, in the borough of *Penryn*, at the rent of 6*l*. a year. These rooms originally formed part of a dwelling-house, which, before 1815, had been subdivided into five distinct dwelling-houses, of which the three rooms occupied by the pauper formed one. The other houses were occupied by other tenants. It was agreed between *Gill* and the landlord that *Gill* should pay all the rates upon the whole property, the amount to be deducted from his rent. *Gill* was accordingly rated to, charged with, and paid the church, poor, and highway rates for the borough of *Penryn*, between 1815 and 1830, for the whole premises, in one entire sum or charge. The aggregate annual value of these premises amounted to 16*l*., being the rent which the landlord received for the same, but the value of the tenement occupied

occupied by *Gill* was under 10*l.* a year. In pursuance of the agreement with his landlord, *Gill*, when he settled his rent, was allowed the amount of the rates which he had from time to time paid. *Gill* was not answerable for the rent of any of the other tenants, nor had he any connection with or control over them.

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Follett in support of the order of sessions. The pauper having, before the statute 6 G. 4. c. 57., been charged with and paid parochial rates in respect of a tenement above the value of 10*l.*, thereby gained a settlement. *Rex v. St. Pancras* (a) has decided, that settlement by rating was not abolished by the 35 G. 3. c. 101. s. 4., in cases where the rating has been in respect of a tenement of the annual value of 10*l.*; and *Rex v. Lower Heyford* (b) shews also, that it makes no difference if the rate be repaid to the occupier by the landlord.

Kelly contra. There are conflicting authorities on the question, whether or not the settlement by rating was abolished by the 35 G. 3. c. 101. *Rex v. Islington* (c), and *Rex v. Penryn* (d), are at variance with *Rex v. St. Pancras* (a), which was decided by three judges only, but which was undoubtedly recognized in *Rex v. Lower Heyford*. The question therefore is, which of these decisions is right? and, in considering that point, it is important to look to the state of the law, before the settlement by rating was given by the 3 & 4 W. & M. c. 11. s. 6. The statute 13 & 14 C. 2. c. 12. s. 1., enables two justices, upon complaint made by parish officers within forty days after any person coming to settle in

(a) 2 B. & C. 122.

(b) 1 B. & Ad. 75.

(c) 1 East, 283.

(d) 5 M. & S. 443.

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any tenement under the yearly value of 10*l.*, that such person is likely to become chargeable, to remove such person to the place where he was last legally settled. If a party, after this statute, resided forty days in a tenement under the yearly value of 10*l.*, he was irremovable, and gained a settlement. If he occupied a tenement of greater annual value, he could not be removed at any time; and, by residing forty days, he gained a settlement. The 1 *Jac.* 2. *c.* 17. *s.* 3., after reciting that poor persons at their first coming to a parish do commonly conceal themselves, enacts that the forty days' continuance of a person in a parish, intended to make a settlement, shall be accounted from the time of delivery of notice in writing of the house of his abode, &c. to one of the churchwardens or overseers of the poor of the parish to which he shall so remove. That enactment manifestly applies to cases where the tenement was under the value of 10*l.*, and the occupier was removable within the forty days. At that time, there was no settlement by rating; but as the object of the notice in writing was publicity, and as that object would be equally well attained when a party was rated to and paid parish rates, the statute 3 & 4 *W. & M.* *c.* 11. *s.* 6. enacts, "that if any person who shall come to inhabit in any parish, shall be charged with and pay his share towards the public taxes or levies of the parish, then he shall be deemed to have a legal settlement in the same, *though no such notice in writing be delivered*, as was thereby before required." The manifest object of the legislature was to substitute for the notice in writing to the parish officers (which was required in cases only where a tenement was under the value of 10*l.*) the rating by the parish officers; which rating was considered by the legis-
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lature to imply notice had by them of the party's coming. Then (the settlement under this act, by payment of **parochial** taxes, being given in cases only where the tenement, in respect of which they were paid, was under the value of 10*l.*,) followed the statute 35 G. 3. c. 101., which, in s. 4., enacts, "that no person shall gain a settlement by being charged with and paying his share towards the public taxes or levies of the parish, for and on account of any tenement not being of the yearly value of 10*l.*" Now it may be conceded, that if the statute 3 & 4 W. & M. c. 11. s. 6. had given a settlement by rating generally, the statute 35 G. 3. c. 101. s. 4. would only repeal that settlement in respect of tenements under the yearly value of 10*l.*: but the former statute gave the settlement by rating, only where the tenement was *under* the value of 10*l.* The whole of that head of settlement is therefore abolished by the last-mentioned act. [*Parke J.* According to your argument, a party might have gained a settlement if rated for a tenement of 5*l.* per annum, but not if rated for one of 500*l.*] The notice in writing, for which payment of rates was afterwards substituted, was required in cases only where the tenement was of less value than 10*l.*; a settlement by payment of rates, was given, therefore, where the tenement was under that value, and in no other case. Since the statute 6 G. 4. c. 57. no question can arise as to settlement by rating, because, even if that head of settlement still subsisted at the passing of the act, all the same circumstances are now required to make a good settlement by rating, as by renting a tenement.

DENMAN C. J. The statute 3 & 4 W. & M. c. 11. s. 6. enacts, "that if any person who shall come to inhabit

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in any parish shall be charged with and pay his share towards the public taxes or levies of the parish, then he shall be deemed to have a legal settlement in the same, though no such notice in writing be delivered, as is thereby before required." It makes no distinction as to the value of the property in respect of which he is to be charged. It would be too much to say that the intention of the legislature was to give a settlement by rating in those cases only where notice was before required to be given to the parish officers. The judgments which have been relied upon, in *Rex v. Islington* (a), and *Rex v. Penryn* (b), were considered with due respect and attention, and overruled, in the case of *Rex v. St. Pancras* (c). The order of sessions must be confirmed.

PARKE J. I am of the same opinion. There is a time when a point, even of sessions-law, ought to be considered as settled.

TAUNTON and PATTESON, Js., concurred.

Order of sessions confirmed.

(a) 1 *East*, 283.

(b) 5 *M. & S.* 443.

(c) 2 *B. & C.* 122.

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ON appeal against an order of two justices, whereby *William Thompson* was removed from the township of *Keswick*, in the county of *Cumberland*, to the township of *Threlkeld* in the same county, the sessions confirmed the order of removal, subject to the opinion of this Court on the following case: —

The pauper, a poor boy of, and then legally settled in, the township of *Threlkeld*, in the county of *Cumberland*, was, in *February* 1819, pursuant to an order of two justices of that county, bound apprentice by the churchwardens and overseers of the poor of *Threlkeld*, to *E. Foster* of, and residing within, the township of *Keswick* in the same county, by indenture for a term therein mentioned. The township of *Keswick* is within the parish of *Crosthwaite*, and is about four miles distant from the township of *Threlkeld*, which is in the parish of *Greystoke*. Each township maintains its own poor separately, and both parishes are in the same county, and within the jurisdiction of the peace of the two justices who made the order for the binding, and who afterwards signed their allowance of the indenture. No notice was given to the overseers of the poor of *Keswick*, or to any of them, of the intention to bind out such apprentice, nor did any of the overseers of that township attend the justices who signed their allowance of the indenture, or either of them, and admit such notice, but the binding, as well as the service and residence under

Under the statute 56 G. 3. c. 139. s. 2. when an apprentice is bound from one parish into another, notice must be given to the overseers of the latter, though both be in the same county and jurisdiction of the peace.

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it, was in all other respects such as would confer a settlement upon the pauper in *Keswick*. The question for the opinion of this Court was, whether such notice was necessary under the circumstances above stated.

Sir *James Scarlett* and *Armstrong* in support of the order of sessions. Notice to the overseers of *Keswick*, the township into which the pauper was to be bound, was necessary in this case by the statute 56 G. 3. c. 139. s. 2.(a); and the directions of the act as to the allowance

(a) By section 1. it is enacted, “ that before any child shall be bound apprentice by the overseers of the poor of any parish, township, &c., such child shall be carried before two justices of the county, &c. wherein such parish, &c. shall be situate, who shall enquire into the propriety of binding such child apprentice to the person to whom it shall be proposed by such overseers to bind such child, and such justices shall particularly enquire and consider whether such person reside, or have his place of business within a reasonable distance from the place to which such child shall belong,” &c., and shall, if they see fit, examine the father and mother, and shall make such other enquiries as are there directed; and if they, upon such enquiry, think it proper that such child should be bound apprentice to such person, such justices “ shall thereupon order that the overseer of the place to which such child shall belong shall be at liberty to bind such child apprentice accordingly, which order shall be delivered to such overseer as the warrant for binding such child apprentice, and such order shall be referred to by the date thereof, and the names of the said justices in the indenture of apprenticeship of such child; and after such order shall have been made, such justices shall sign their allowance of such indenture of apprenticeship before the same shall be executed by any of the other parties thereto. Provided always, that no such child shall be bound apprentice to any person residing, or having any establishment in trade at which it is intended that such child shall be employed out of the same county, at a greater distance than forty miles,” &c.

Sect. 2. “ And be it further enacted, that in all cases where the residence or establishment of business of the person to whom any child shall be bound shall be within a *different county or jurisdiction of the peace* from that within which the place by the officers whereof such child shall be bound shall be situate, and in all other cases where the justices of the peace for the district or place within which the place by the officers whereof such child shall be bound shall be situated, and who shall sign the allowance of the indenture

ance of the indenture not having been followed, then, by s. 5., no settlement is gained. In *Rex v. Newark-upon-Trent* (a), it was decided that such notice was necessary to be given to the overseers, where the parish into which the apprentice was to be bound was within a different jurisdiction from the binding parish, though in the same county; and the question in this case is, whether the statute applies equally where the two parishes are within the same county, and neither of them within any separate jurisdiction. The argument of *Holroyd J.*, in *Rex v. Newark-upon-Trent*, applies here; his opinion was, that the intent of the act was that notice

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indenture by which such child shall be bound, shall not have jurisdiction, every indenture by which such child shall be bound shall be allowed as well by two justices of the peace for the county or district within which the place by the officers of which such child shall be bound shall be situated, as by two justices of the peace for the county or district within which the place shall be situated wherein such child shall be intended to serve: Provided always, that no indenture shall be allowed by any justice of the peace for the county into which such child shall be bound, who shall be engaged in the same business, employment, or manufacture in which the person to whom such child shall be bound is engaged; and notice shall be given to the overseers of the poor of the parish or place in which such child shall be intended to serve an apprenticeship, before any justice of the peace for the county or district within which such parish or place shall be, shall allow such indenture, and such notice shall be proved before such justice shall sign such indenture, unless one of such overseers shall attend such justice and admit such notice."

Sect. 3. "Provided always, that the allowance of two justices of the peace for the county in which such child shall be intended to serve an apprenticeship shall be situated, shall be valid and effectual, although such place may be situated in a town or liberty within which any other justices of the peace may, in other respects, have an exclusive jurisdiction."

Sect. 5. "That no settlement shall be gained by any child who shall be bound by the officers of any parish, township, or place, by reason of such apprenticeship, unless such order shall be made, and such allowances of such indenture of apprenticeship shall be signed as hereinbefore directed."

(a) 3 B. & C. 59.

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should be given to the overseers of the parish in which the apprentice is intended to serve, whether the binding were in the same or a different county. And Lord *Tenterden*, who differed from the other Judges, admitted that there was no reason for expressly requiring notice to the parish officers where the binding is into another county, which might not be urged with almost equal force to a binding in the same county. The overseers of a parish at one extremity of a county, are not likely to be better acquainted with the circumstances of a parish at the other extremity than with those of an adjoining parish though situate in a different county. Then, if it be consistent with the general policy of the act that notice should be given in cases where the binding is in the same county, the language of that part of the proviso in sect. 2., which requires notice to be given, is sufficiently large to comprehend cases where the two parishes are in the same county. The circumstance of that proviso being, in the printed statute, part of the second section, ought not to confine it, in point of construction, to cases mentioned in that and not in the preceding section; for, in the parliamentary rolls, the clauses are not so distinguished.

F. Pollock and *Aglionby* contra. If it be held that notice is necessary to be given in all cases to the overseers of the parish into which the apprentice is to be bound, a party will, in this case, be deprived of a settlement without any express words in the act of parliament for that purpose. In *Rex v. Newark-upon-Trent* (a) Lord *Tenterden* says, “As to some of the

(a) 3 B. & C. 80.

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directions, the statute is introductive of a new law; and as a non-compliance with its directions will prevent the gaining of a settlement, I apprehend that, according to general principles, the construction of the statute must not be carried beyond the plain and obvious meaning of the language of the directions, upon any supposition that a case not within such meaning may be within the mischief intended to be remedied, or within the reason upon which the direction may be supposed to have been enacted." Section 1., which applies to every case of the binding of a parish apprentice, says nothing of notice. Section 2. is confined to certain particular bindings with reference to the local authorities of the justices of peace. It is said that the sentence beginning with the words "*provided always,*" must apply to the whole former part of the act; but the words "that no indenture shall be allowed by any justice of the peace *for the county into which such child shall be bound,*" plainly shew that it must be confined to cases where the binding is from one county into another, which are the cases included in the enactment immediately preceding. Then, the sentence beginning with the words "and notice shall be given to the overseers," &c. forms a second part of the same proviso. It does not begin with the words "provided also," but is connected with the preceding sentence by the conjunction *and*. It is therefore confined to the cases mentioned in the preceding sentence, viz. to those in which an allowance of an indenture by justices of two different jurisdictions is required.

DENMAN C. J. The pauper gained a settlement in *Keswick*, unless he was prevented from so doing by the 56 G. 3. c. 139. s. 5., which enacts, "that no settlement shall

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shall be gained by any child who shall be bound by the officers of any parish, &c., by reason of such apprenticeship, unless *such order* shall be made, and *such allowances* of such indenture of apprenticeship shall be signed *as hereinbefore directed.*" It is said here that there have not been such an order, and such allowances of the indenture signed as by the act directed, and I am of that opinion. The act of parliament contains a proviso (s. 2.) that "notice shall be given to the overseers of the poor of the parish or place in which such child shall be intended to serve an apprenticeship, before any justice of the peace for the county or district within which such parish or place shall be, shall allow such indenture, and such notice shall be proved before such justice shall sign such indenture, unless one of such overseers shall attend such justice and admit such notice." Now here the sessions have found that no notice was given to the overseers of *Keswick*, nor did the overseers of that parish attend before the justices and admit such notice. But it is contended that notice is not necessary in a case where the binding parish, and that in which the apprentice is to be bound, are within the *same* county, and consequently within the jurisdiction of the same magistrates. But the object of the legislature being, as may be collected from the preamble, that every possible precaution should be taken in the binding out of the poor apprentice, it is manifest that the same necessity for notice may exist in either case. It seems to me absurd to say that merely passing the boundary of the county should render that necessary in one case which was not so in another. The provision that "no settlement shall be gained unless such order shall be made," &c. is for the advantage of the apprentice, because it
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then becomes the interest of the officers of the binding parish to take care that the apprentice shall be well bound. With all deference to the opinion of Lord *Tenterden* in *Rex v. Newark-upon-Trent* (a), and admitting that the different clauses of this act of parliament are not easily reconcileable with each other, I think that the proviso as to notice in the second section is not confined to cases where the two parishes are situate in different counties, but that it extends to all the cases mentioned in the first section as well as the second. There are no words to control or limit that construction; it is beneficial to the apprentice, and by adopting it we do not violate the grammatical sense of the language used by the legislature.

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PARKE J. I am of the same opinion. The doctrine that an act of parliament is to be construed so as to favour settlements, has been long and justly exploded. There is no rule of law which calls on us to put a strict construction on this act of parliament. We must endeavour, therefore, to discover the intention of the legislature and carry it into effect, if the language used will warrant us in so doing; and the question is, whether, putting a proper grammatical construction on the proviso, it is confined to cases where the two parishes are situate in different counties, and consequently within the jurisdiction of different magistrates, or extends to those where the parishes are in the same county and jurisdiction. The circumstance of its being printed as part of the second section can make no difference in the construction, because, on the parliament rolls, the acts

(a) 3 B. & C. 59.

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are not divided into sections. Now, the terms of the proviso are, “and notice shall be given to the overseers of the poor of the parish in which such child shall be intended to serve an apprenticeship, before any justice of the peace for the county or district within which such parish shall be, shall allow such indenture, and such notice shall be proved before such justice shall sign such indenture.” The language would be more accurate if it had been said “before he shall allow, and before he shall make the order for the binding;” but the word *allow* is used in the statute as common to both. The language, therefore, of the proviso is sufficiently large to include cases where the parishes are in the same, as well as where they are in different counties, and the sense and reason of the thing seem to require, also, that it should extend to each class of cases. I thought also reason required that the first part of the proviso should be general, but as a different opinion was expressed by some of the judges on that point in *Rex v. Newark-upon-Trent (a)*, I do not wish to give any decisive opinion upon it; if, however, the first part of the proviso extends to all cases, the second undoubtedly does, and if the first does not so apply, no reason can be given why the second should not. Upon the whole, I think that the opinion delivered by *Holroyd J.*, in *Rex v. Newark-upon-Trent*, is perfectly correct, that notice was necessary to be given in this case, and that, for want of such notice, no settlement was gained in *Keswick*.

TAUNTON J. I frankly acknowledge there are some expressions in the second section which I do not per-

(a) 3 B. & C. 71. 84.

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fectly understand, but they are not material to the question before the Court. I see enough to convince me that the order of sessions is right. That part of section 2. which begins with the words "and notice shall be given," is a general enactment, applicable to all the cases embraced in the first section. As to the part which begins with "provided always that no indenture shall be allowed," &c. I am by no means satisfied that those are not words of general enactment; but, however that may be, the words respecting notice are undoubtedly general; and the sense and reason of the thing require that they should be so. There may be as much reason for requiring notice in a case where the two parishes are in the same county, as where they are in different counties. Two parishes in the same county may be at a great distance from each other, and two parishes in different counties may be adjoining each other; and it is manifest that notice may be as necessary in the one case as the other. Where, indeed, the two parishes are in different counties, notice need not be given to the overseers of the master's parish until the parties go before the magistrate having jurisdiction over that parish: but where the two parishes are in the same county, the notice must be given before the indenture be allowed. The order of sessions must be confirmed.

PATTESON J. I am of the same opinion. I think that, by sect. 2., notice is required to be given to the overseers in all cases. The early part of sect. 2. requires that the indenture shall be allowed by the magistrates having jurisdiction over the place *from* which the apprentice is to be bound, as well as by the magistrates of the place *into* which the apprentice is to be bound.

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bound. If the parishes are within different jurisdictions, two sets of justices are required; if within the same, only one: but in the latter case, they are magistrates for each parish. Where there are to be two allowances, notice need not be given to the overseers of the master's parish till the parties go to the second set of justices, because they are the persons who are to make the order; but where there is only one set of justices, notice must be given to the overseers of the master's parish before the indenture be allowed by the justices making the order. I am, therefore, of opinion that the order of sessions was right.

Order of sessions confirmed.

*Monday,
Nov. 19th.*

The KING against The Justices of NORFOLK.

48-467 By the statute
17 G. 2. c. 38.,
it is discre-
tionary in ma-
gistrates to
commit an
outgoing
churchwarden
or overseer who
neglects or
refuses to
account.

2 Bac. 74.

THE appeal against the accounts of the overseers of the poor of the parish of *Brancaster*, having been heard at the *January* sessions 1831, was dismissed (a). An information was afterwards laid against *L. Sims*, who had been one of the churchwardens, for not having rendered an account pursuant to the 17 G. 2. c. 38. A summons having been granted against him, he appeared by attorney, and it was proved that he was eighty years of age, very infirm, and although he had been elected churchwarden, he had never been sworn in, and that, although he signed the poor rates, he had never interfered in their collection or received any of the parish monies. The justices, under these circumstances, having

(a) 2 B. & Ad. 944.

refused

refused to commit him, a rule was obtained calling upon the justices and *Sims* to shew cause why a mandamus should not be directed to the justices to issue their warrant of commitment pursuant to the statute.

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F. Pollock and *Kelly* now shewed cause. The commitment to gaol, authorised by this statute, is a judicial act. Section 1. requires the outgoing churchwardens and overseers, yearly, to “deliver to the succeeding overseers a just, true, and perfect account in writing of all sums of money by them received, or rated and assessed and not received, and also of all monies paid by such churchwardens and overseers so accounting, and of all other things concerning their said office.” Here, *Sims* had no account to render; but assuming that he was bound to account, section 2. is not imperative on the magistrates to commit, but gives them a discretionary power to do so or not; the words of that section being, that in case such churchwardens and overseers shall refuse or neglect to account, “it *shall and may be lawful*” for the justices to commit.

Palmer contra. *Sims* acted as overseer by signing the rate; and, by the statute, he is bound to deliver in an account, not only of all sums of money received, but of monies rated and assessed and not received, and of all other things concerning the office.

DENMAN C. J. The justices were satisfied that, under the circumstances of this case, there was no ground for commitment; and the statute *authorizes*, but does not *compel*, them to commit. There is no ground, there-

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therefore, for issuing a mandamus to the magistrates; and the rule, as to them, must be discharged with costs, but, as to *Sims*, without costs.

PARKE J. *Sims* ought to have rendered some account. The magistrates, however, having exercised their discretion and refused to commit him, I think the rule should be discharged, as to them, with costs, and without costs as to *Sims*.

TAUNTON J. concurred.

PATTESON J. I am of the same opinion. *Sims* ought certainly to have delivered some account; because the statute requires that he shall render an account of the monies rated and assessed and not received, and of all other things concerning his office.

Rule discharged.

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RUBERY *against* STEVENS and Another.

COVENANT by reversioner, against the defendants as assignees of a term in certain premises demised by indenture at the yearly rent of 26*l.*: breach, non-payment of the rent for two years. Plea, that the defendants ought not to be charged with rent otherwise than as executors, in the detinet only: they then stated that the term came to them as executors of one *Peter Walker*, and continued as follows: — “And the defendants further say, that the said demised premises, &c. at the time of the death of the said *P. W.* were, and from thence hitherto have been, and still are, of much less yearly value than the value of the said rent of 26*l.* a year so by the said indenture reserved as aforesaid, that is to say, the same premises during all the time aforesaid were and still are of no value whatever.” The plea concluded with a plene administravit. Replication, that the premises at the time of *Walker’s* death were, and from thence hitherto have been, and still are, of the yearly value of 26*l.*: upon which averment issue was joined. At the trial before Lord *Tenterden* C. J., at the sittings in *Middlesex* after *Hilary* term 1832, his Lordship left it to the jury to say what had been the annual value of the premises during the time in question; they found it to have been 20*l.*, and gave a verdict for the plaintiff for arrears at that rate; but leave was given to the defendants to move to

Where the residue of a term of years becomes vested in executors, and the yearly value is less than the reserved rent, the executors are still liable in the debet and detinet as assignees, for so much of the rent as the premises are worth.

The plaintiff having declared in covenant for rent at 26*l.* a year, the defendants pleaded that they were only chargeable as executors; that the term came to them as such, that the premises were of less yearly value than the said rent of 26*l.*, viz. of no value, and that they had fully administered, &c. Replication, that the premises were of the yearly value of 26*l.*; issue thereon. At the trial the yearly value was found by the jury to be 20*l.*:

Held, that the replication was, in substance, that the premises were of some value; that the issue was merely informal, and cured by verdict; and that the plaintiff might recover the arrears of rent at the rate fixed by the jury.

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enter a nonsuit, on the grounds, that the issue between the parties was, in substance, whether or not the premises were of the value stated in the declaration; that they had been proved not to be of that value; and, therefore, that the defendants were not liable to any amount, otherwise than as executors. A rule nisi having been obtained,

Sir *James Scarlett* and *Cottingham* shewed cause in the present term. If the premises were of *any* value, the defendants are liable as assignees. Their defence is, in substance, that they have derived no profit whatever from the premises, and consequently are not chargeable as assignees, but as executors only; and that as executors they have fully administered all the effects that came to their hands. But it being found that the premises were of some value, they are liable as assignees to that extent: 1 *Wms. Saund.* 112. note (c) 5th edit.-(a). It is true the plea states the premises to have been of less value than 26*l.* a year, that is to say, of no value,

(a) The result of the cases is there stated as follows: — “If an executor be sued in his representative capacity for rent accruing in his own time, either in debt or covenant, where the lease is by deed, or in debt or assumpsit for use and occupation, where the lease is not by deed, he may plead *plene administravit*, and under that plea may shew that the land yields no profit, and that he has no assets aliunde; but if the land yields a profit equal to the rent, he will fail on a plea of *plene administravit*, for he is bound to apply the profits of the land towards payment of the rent in the first instance, and his not doing so will be a *devastavit*; if, therefore, the land yields some profit, but less than the rent, it should seem that his plea should be *plene administravit præter the profit*. If, on the other hand, the executor be sued, as he may be when he enters and is in the actual occupation, in his individual capacity as assignee of the term, in debt on a lease by deed, he must plead specially that he holds only as executor, that the land yields no profit, or less than the rent, and pray whether he shall be charged otherwise than in the *detinet*; in covenant, he must plead the same matters specially.”

and

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that the premises were of less value than the rent, to wit, of the value of 100*l.* only, and that he had fully administered; and the Court was of opinion, that if this had been the only matter pleaded, it might have been a good bar. *Billinghurst v. Speerman* (a) is to the same effect. If the premises are worth less than the rent, it is *damnosa hæreditas*, and, with reference to the question of liability as assignee or as executor, it is the same as if they were worth nothing. The value specified in these pleadings was therefore material; and the plaintiff, having proved a less value, cannot recover. Besides, if it was competent to him to tender issue on the question whether or not the premises were of *any* value, he has not used words which have that effect.

Cur. adv. vult.

DENMAN C. J. in the course of this term delivered the judgment of the Court.

There are two questions in this case. The first, whether the substance of this plea is, that the tenements demised were *not of the value of the rent*; or that they were of *no value whatever*.

The second, whether, if the latter be the substance of the plea, the plaintiff is entitled to judgment on this issue upon the facts found by the jury.

Upon referring to the authorities, and considering the case, we are of opinion that the plaintiff upon these pleadings is entitled to a verdict.

It is clearly settled that the executor of a termor cannot waive the term, but that he must either renounce or accept the executorship in toto: and if he accept the

(a) 1 *Salk.* 297.

executor-

executorship, and enter on the demised premises, he is chargeable as assignee in an action of debt or covenant for the arrears of rent due after his entry, *de bonis propriis*. But as the rent may be of greater value than the land, it would be a great hardship on the executor in that case to charge him personally in his own right with the full amount of the rent. And it is quite clear from the authorities that he is not so chargeable. But then arises the question, whether he be *personally* liable, in that event, as assignee, for no part of the rent, considering it as an *entire thing*, for the whole of which he must be so liable or not at all; or whether the rent can be apportioned, and he is liable in the character of assignee for so much of the rent as the premises are worth. Upon reference to the authorities it seems that the rent is in this case to be apportioned, and the executor is chargeable personally for so much of the rent as the premises are worth.

In one of the earliest cases, *Hargrave's case* (a), it was adjudged that in an action against the executor for rent due in his own time, the writ should be in the *debet and detinet*, "for when an executor takes the profits nothing shall be assets but the profits above the rent: as, if the land be worth 10*l.* per annum, and 5*l.* is reserved, in that case nothing shall be assets but the 5*l.* above the rent."

The next material case is that of *Helier v. Casebert*, reported in several books. In 1 *Lev.* 127. *Kelynge* says, "The executor cannot waive the term, but shall be charged in the *detinet*, on which the assets shall come in question; and if he continues the possession, he shall

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(a) 5 *Coke*, 31 b.

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be charged in the debet and detinet in respect of *the perception of the profits*, whether he has assets or not; to which *Twysden* agreed."

In the same case, 1 *Sid.* 266., it is stated that it was resolved by all that an executor cannot waive, if he does not waive the executorship; and this although the testator took a demise of land which is worth only 10*l.* a year, rendering 20*l.* a year, this contract binds the executor as long as he has assets; but, per *Windham J.*, semble "that if an action in this case is brought in the debet and detinet, and the executor pleads nil debet, and on the evidence it appears that the land is worth only 10*l.* a year, he shall have a verdict for 10*l.* a year, and for the other 10*l.* the lessor shall have an action on the detinet tantum, because he is solely liable in respect of the contract." The reporter adds a query.

There is an argument of *Pollexfen* when at the bar, in his reports, p. 132., which places this question in a clear point of view. He says, "If it should be admitted that in such case where the rent is more than the value of the land, in an action in the debet and detinet the defendant shall not be charged for the whole rent, yet he ought to be charged for so much as the land is worth. This I ground upon what has been said, that if an action in the debet and detinet lie where the land is of as much value as the rent, it ought then to lie for *as much of the rent as the value of the land amounts unto* in the debet and detinet: then, if so, their plea is pleaded as a bar to the whole rent, whereas it is only a bar to part, viz., to the 60*l.* over and besides the value; and as for the 100*l.*, by his own shewing, we ought to recover, for by his own shewing, he is chargeable in the debet and detinet for that."

" In

“ In debt for rent, the defendant pleads an eviction of part of the land, and sets out the value: this is only a bar to a part of the rent, and if he pleads nothing to the rest, judgment must be against him for the whole.”

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In the case of *Buckley v. Pirk* (a), Chief Justice *Parker* (Lord *Macclesfield*) says, “ If the rent be of less value than the land, as the law *prima facie* supposes, *so much of the profits as suffices to make up the rent*, is appropriated to the lessor, and cannot be applied to any thing else. On the other hand, if the rent be worth more than the land, the defendant may disclose that by special pleading, and pray judgment whether he shall be charged otherwise than in the *detinet* only.”

It appears to us, that the dictum of *Windham* and the argument of *Pollexfen* are well founded in law: for if the profits are appropriated to the lessor, and become a *personal debt* due from the executor to him, where they are equal to or greater than the rent, why should they not be equally appropriated to the lessor, and equally a *personal debt* due from the executor where they are less? If so, it follows that the plea in this case, which is pleaded to the whole rent in the declaration, cannot be a good bar, unless it shews that there were no profits at all. If they had been less than the rent, and therefore covered a part only, that part should have been confessed, and the plea pleaded to the remainder. The substance of the plea, therefore, must be taken to be, that the demised tenements *were of no value whatever*.

The second question is, as to the form of the issue: and whether the plaintiff be entitled to judgment?

The jury have found the demised tenements to be worth 20*l.* a year only.

(a) 1 *Salk.* 317.

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The substance of the plea being, as above mentioned, that the premises were of no value, we think that the substance of the replication is, that they were of some value, and that the issue is merely informal, and cured by verdict.

Looking at the allegations on both sides, there is an averment by the plaintiff, that the demised premises are of the yearly value of 26*l.*; and on the part of the defendant, that they are of much less value than 26*l.*, that is to say, of no value whatever, which is equivalent in substance to an allegation that they are not of the value of 26*l.*, or any part thereof.

We therefore think that the substance of the issue is, whether the demised tenements were worth any thing, and that issue ought, on the facts, to be found for the plaintiff. If they are of any value whatever, the plea is falsified, for it constitutes no defence to the action for the whole rent unless they are of no value.

Rule discharged.

The KING *against* The Inhabitants of LEEDS.

Under the statute 33 G. 3. c. 54. s. 24. (which is in substance the same as 12 Ann. st. 1. c. 18. s. 2.), an apprentice bound to a person residing in a parish under a certificate, cannot gain a settlement by such

ON appeal against an order of two justices, whereby *Nathaniel Bowles*, his wife and children, were removed from the township of *Horton*, in the West Riding of *Yorkshire*, to the parish of *Leeds*, in the same Riding, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The pauper's father was settled in *Leeds*. In 1809 apprenticeship, though the certificate be subsequently discharged, and he afterwards continue to serve his master in the parish for forty days. The binding, to confer a settlement, must be such as would, at the time, be effectual for that purpose.

the

the pauper, being about thirteen years of age, was bound apprentice by his father for seven years to *Joseph Fox*, shoemaker, who was then residing in *Horton*, under a certificate from a Friendly Society. Four years after the indenture was made, *Fox* took a farm for a year in *Horton* at 40*l.*, which he occupied for the year. The pauper continued to serve his master for seven years from the date of the indenture. The sessions, being of opinion that the pauper had not gained a settlement by such apprenticeship, confirmed the order. The case was argued in the course of this term.

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Blackburne and *Milner* in support of the order of sessions. Under the statute 33 G. 3. c. 54. s. 24. (a), no settlement was gained by this apprenticeship. For that purpose, the binding ought to be to a master who is at the time capable of communicating a settlement. By 3 W. & M. c. 11. s. 8. *binding* and *inhabitation* confer the settlement: if the master is not settled at the time of the binding, his becoming so afterwards will not enure to render it valid. This is clearly to be inferred from *Rex v. Hinckley* (b). Lord *Kenyon* there, referring to 12 Ann. stat. 1. c. 18. s. 2. (which is similar to the clause in question of 33 G. 3.), says, it is necessary that the binding should be such as would confer a settlement by service under the master, "for the legislature intended that no act whatever of this sort done by a certificated man should help to bind the parish." In *Rex v. Manningtree* (c), the son of a certificated person was bound apprentice, before he came of age, to a master

(a) The material part of the clause is given in the judgment. The act is now repealed. See 10 G. 4. c. 56.

(b) 4 T. R. 371.

(c) 6 M. & S. 214.

living

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—
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ants of
LEEDS.

living out of the parish; and after coming of age, he slept more than forty nights in the certificated parish, while serving under the apprenticeship. There was a sufficient inhabitation in the parish after he was emancipated, to have conferred a settlement, but the binding was before: and the Court held, on that account, that no settlement was gained. In *Rex v. Great Driffeld (a)*, the present question was raised, but not decided. *Rex v. Nacton (b)*, decided last term, is no authority in favour of this settlement, for there the master had taken a tenement in the certificated parish at the time of the binding, and was then irremovable.

Sir G. A. Lewin and Baines, contra. A settlement was gained by this service. In *St. Maurice v. St. Mary Calendars, Winchester (c)*, which was a case under 12 Ann. stat. 1. c. 18. s. 2. Lord Hardwicke stated the question to be, “whether the apprentice of this man (a certificated person) gained a settlement in *St. Mary’s* by serving an apprenticeship to him there.” After reading the words of that statute, “and *not having afterwards gained* a legal settlement in such parish,” he added, “which brings it to this question, whether the master had by any act discharged the certificate, and gained a settlement in the parish into which he came by certificate.” In *Ivinghoe v. Stonebridge (d)*, the pauper was bound to a certificated person, who subsequently bought an estate in the parish, whereby the certificate was discharged, and the apprentice afterwards served him six months: the facts happened before the statute of *Anne*, but the Court held, that even if they had

(a) 8 B. & C. 684.

(b) 3 B. & Ad. 543.

(c) Burr. S. C. 27.

(d) 1 Stra. 265.

occurred

occurred since that act, the apprentice would have gained a settlement. *Rex v. Nacton* (a) is an authority in favour of this settlement. If the apprentice himself, in the present case, had been a person included in a certificate, the question would have been different; his gaining a settlement might have been contrary to the express words of 9 & 10 *W. 3. c. 11.*, which provides that no person who shall come into any parish by a certificate, “shall be adjudged *by any act whatsoever* to have procured a legal settlement in such parish,” unless by taking a tenement of 10*l.* value, or executing an annual office: and, on this ground, *Rex v. Manningtree* (b) may be distinguished from the present case. But there are no corresponding words in 33 *G. 3. c. 54. s. 24.* applicable to the apprentice of a certificated person, the apprentice himself not being so. In *Rex v. St. Peter’s, Derby* (c), the pauper was bound to a certificated man, who afterwards removed into a different parish, under a new certificate; but the pauper served him more than forty days after that time in the original parish; and it was held, that the pauper gained a settlement there by such service, the certificate to that parish having been discharged.

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against
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ants of
LEEDS.

Cur. adv. vult.

DENMAN C. J. on a subsequent day of the term, delivered the judgment of the Court.

The question in this case was, whether a pauper had gained a settlement in the parish of *Horton*. The pauper was bound apprentice to a master who was at that time residing at *Horton*, under a certificate from a

(a) 3 *B. & Ad.* 545.(b) 6 *M. & S.* 214.(c) 1 *T. R.* 218.

friendly

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—
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ants of
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friendly society, but before the term of apprenticeship expired the master gained a settlement in *Horton* by renting a tenement, and the pauper served him under the indenture of apprenticeship more than forty days after that time.

The question turns upon the proper construction of the 33 G. 3. c. 54. s. 24., by which it is enacted, “that no person who shall be an apprentice bound by indenture to any person who did come into or shall reside in any parish, township, or place under the authority of this act, and *not afterwards having gained a legal settlement in such parish, township, or place*, shall gain or be adjudged to have any settlement in such parish, township, or place, by reason of such apprenticeship or binding; but all such apprentices shall have their settlements in such parish, township, or place, as if they had not been bound; any act or acts of parliament to the contrary notwithstanding.” These words are copied nearly verbatim from 12 *Ann. stat.* 1. c. 18. s. 2., which act has received a judicial construction in the case of *Rex v. Hinckley (a)*, by which case we think we are bound.

That case differs from the present in one circumstance only, viz. that in that case the pauper having been bound to a certificated man, was afterwards assigned to another person in the same parish who was under no disability; whereas here the pauper continued with the original master after his certificate was discharged. But the reasons given by Lord *Kenyon*, in delivering the judgment of the Court, which was evidently much considered, apply to the present case as

(a) 4 T. R. 371.

much

much as to that, and we cannot decide in this case that the pauper gained a settlement without over-ruling *Rex v. Hinckley* (a).

The words of the statute are plain; that an apprentice *bound* to a man who did come into or shall reside in a parish under a certificate, and not *afterwards* having gained a settlement, shall not by such apprenticeship or binding gain a settlement in that parish, but shall be as if he had not been *bound*. Now the words “not afterwards having gained a settlement,” are grammatically to be referred to the preceding words “come into or reside,” and manifestly point to the situation of the master at the time of the binding. If the master be residing under the certificate at the time of the binding, no settlement can by possibility be acquired by the apprentice in the certificated parish, notwithstanding a subsequent removal of the master’s disability; but it is otherwise if the binding is after the discharge of the certificate, where the master has gained a settlement in the certificated parish. Lord *Kenyon* says, “it is necessary that the *binding* should be such as would be capable of conferring a settlement by service under the original master in that place, otherwise no settlement can be gained *there* by virtue *thereof*; for the legislature intended that no act whatever of this sort done by a certificated man, should help to bind the parish.” Here, according to this opinion, the binding was not, at the time it took place, such as would be capable of conferring a settlement, nor could any subsequent circumstances make the binding more efficacious, whatever effect they might have on the service: the

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(a) 4 T. R. 371.

conse-

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consequence is, that the pauper remained as if he had not been bound, and gained no settlement in *Horton*.

The case of *Ivinghoe v. Stonebridge* (a) was pressed in argument, but in that case the service expired before the passing of the statute of *Anne*, and besides, the original binding was not to a certificated person, and was free from all objection.

The case of *Rex v. St. Peter's, Derby* (b) was also pressed. It is sufficient to say, that in that case the present question was not presented to the Court, but it was decided without argument, on the sole point, whether one certificate was discharged by the granting of another; and the case was also prior to *Rex v. Hinckley* (c).

Neither does our opinion militate against the case of *Rex v. Nacton* (d), decided in *Easter* term last; for that case proceeded entirely on the ground that the master never did reside under the certificate, but came into the parish in a condition to obtain a settlement.

Upon the whole we are of opinion that the case of *Rex v. Hinckley* must govern the present decision, and that the order of sessions must be affirmed.

Order of sessions affirmed.

(a) 1 *Str.* 265.

(c) 4 *T. R.* 371.

(b) 1 *T. R.* 218.

(d) 3 *B. & Ad.* 543.

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GODSON *against* SANCTUARY.Tuesday,
Nov. 20th.

ACTION on the case against the defendant as sheriff of *Sussex*, for a false return of nulla bona to a writ of fi. fa., issued at the suit of the plaintiff against the goods and chattels of one *A. Weller*. Plea, not guilty. At the trial before Lord *Tenterden* C. J., at the *Middlesex* sittings after *Trinity* term 1832, the jury found a verdict for the plaintiff for 170*l.* 10*s.*, subject to the opinion of this Court on the following case:—

On the 12th of *August* 1830, a judgment was signed on a warrant of attorney (dated the 4th of the same month) by the plaintiff against *A. Weller*, and on the same day a fieri facias was issued thereupon, directed to the defendant as sheriff of *Sussex*, indorsed to levy 170*l.* 10*s.*, besides, &c., and was delivered to the defendant to be executed; and he issued his warrant, in pursuance of which the sheriff's officer, shortly before eleven o'clock in the forenoon of the 13th of *August*, entered the premises of *Weller* and took possession of his goods. He remained ten or twelve days, holding such possession, and then sold under the writ sufficient of such goods to raise the above sum of 170*l.* 10*s.*, poundage and expenses, and received the amount.

On the 13th of *October* 1830, about twelve or one o'clock in the afternoon, a commission of bankrupt issued

issued on a judgment entered up in pursuance of a warrant of attorney, yet, having been executed more than two months before the issuing of the commission, it was protected by s. 81., and not taken out of that section by the proviso in s. 108. Semble, that that proviso only applies to executions executed within two calendar months before the issuing of a commission.

A fieri facias 2*l.* 2*s.* 6*d.* -- 4*d.*
was sued out 11*l.* 2*s.* 5*d.*
on a judgment 10*l.* 10*s.* 4*d.*
entered up 10*l.* 10*s.* 2*d.*
under a warrant
of attorney,
and the sheriff
seized the
goods before
ten in the
forenoon of the
13th of *August*,
and sold the
same ten days
afterwards.

On the 13th of
October follow-
ing, about noon,
a commission
issued against
the defendant,
under which
he was declared
a bankrupt:

Held, first,
that the seizure
of the goods by
the sheriff was
a sufficient ex-
ecuting or
levying, within
the meaning
of those words
in the statute
6 G. 4. c. 16.
s. 81.; secondly,
that more than
two calendar
months had
elapsed between
the execution
and the issuing
of the commis-
sion; thirdly,
that although
the execution

against

1*l.* 2*s.* 5*d.* 6*d.*

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against
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against *Weller*, under which he was duly found and declared a bankrupt. The act of bankruptcy had been committed some time in *June* 1830. The assignees having indemnified the sheriff, the money was paid over to them, and the defendant made his return as above stated.

Hutchinson for the plaintiff. The plaintiff, the execution creditor, is entitled to recover, because his execution was levied more than two months before the issuing of the commission, and is therefore protected by 6 G. 4. c. 16. s. 81., which enacts, “that all executions against the goods and chattels of such bankrupt, bona fide executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed.” It may be said, first, that the seizure of the goods by the sheriff was not an executing or levying within the meaning of that act; but when the sheriff entered and seized the goods, the property was divested out of the bankrupt and vested in the sheriff, so that he might sell, even after he was out of office, *Clarke v. Withers* (a). [*Patteson* J. It was held by a great majority of the Judges in *Giles v. Grover* (b), that the property of the goods seized in execution is not out of the bankrupt until sale.] The plaintiff might have compelled the sheriff to sell, and was entitled to a priority. *Stead v. Gascoigne* (c) could not have been decided as it was if that were not the law. In *Sadler v. Leigh* (d) the point was not taken; there was no sale in that case, and if the doctrine to be contended for on the part of the

(a) 2 *Ld. Raym.* 1072.(b) 9 *Bingh.* 128.(c) 8 *Taunt.* 527.(d) 4 *Campb.* 195.

defendant

defendant is right, the question on the fraction of a day could not have arisen. [*Patteson* J. As between the plaintiff in the execution and the sheriff, the latter may be called upon, after seizure, to return the writ, though the property may not be divested out of the debtor. *Parke* J. This execution was founded on a judgment entered up on a warrant of attorney. Does not the proviso in section 108. prevent the plaintiff from receiving more than a rateable part of his debt (a)?] Here, the plaintiff is not a party seeking a benefit under the commission: he was not within the 108th section as a *creditor* who, at the time of the bankruptcy, had security for his debt. On this point *Wymer v. Kemble* (b) is an authority. There an actual sale of the goods had taken place before the bankruptcy; here it had not; but the seizure by the sheriff was two months before the commission issued.

As to the question, whether two months had elapsed between the levying of the execution and the issuing of the commission, the authorities establish that where time is to be computed from an act done, the day on which the act is done is to be included in the computation, *Rex v. Adderley* (c), *Castle v. Burditt* (d),

(a) By that section it is enacted, "That no creditor having security for his debt, or having made any attachment in *London*, or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon any part of the property of such bankrupt before the bankruptcy: provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with such creditors."

(b) 6 B. & C. 479.

(c) *Doug.* 463.

(d) 3 T. R. 625.

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Glassington v. Rawlins (a), *Cowie v. Harris (b)*; but upon this point *Ex parte Farquhar (c)* is decisive. According to these cases, the two months would not include any part of the 13th of *October*. But the fraction of a day will be noticed if necessary, *Thomas v. Desanges (d)*, *Sadler v. Leigh (e)*; and at all events, more than two months had elapsed between eleven o'clock of the forenoon of the 13th of *August*, and twelve o'clock at noon of the 13th of *October*.

W. Clarkson contra. It must be conceded, since the case of *Giles v. Grover (g)*, that the seizure of goods under a *fi. fa.* is a sufficient levying or executing within the meaning of this statute; but, here, two months had not elapsed between the seizure and the issuing of the commission. The seizure took place on the 13th of *August*; the commission issued on the 13th of *October*. There cannot be three thirteenths in two months, and the day of the seizure must be excluded. It is true that in *Cowie v. Harris (b)*, where a commission issued on the 14th of *May*, Lord *Tenterden* held, at *Nisi Prius*, that a dealing on the 14th of *March* was not invalid as being less than two calendar months before the issuing of the commission, for he said that both days could not be reckoned inclusively, so as to make *March* the 14th not "more than two calendar months" before *May* the 14th, the date of the commission. But that opinion is at variance with the decision of the Court of King's Bench in *Hardy v. Ryle (h)*, which was an action against a justice for false

(a) 3 *East*, 407.(c) 1 *Montague & Mac.* 7.(e) 4 *Campb.* 195.(h) 9 *B. & C.* 603.(b) 1 *M. & M.* 141.(d) 2 *B. & A.* 586.(g) 9 *Bingh.* 128.

imprisonment; the plaintiff there was discharged from prison on the 14th of *December*, and the writ in the action issued on the 14th of *June*, and it was held, that the action was brought *within* six calendar months after the act committed. But assuming this point to be against the defendant, the plaintiff is not entitled to recover, because he was a creditor having security for his debt; and he, therefore, is to receive only a rateable proportion of such debt. In *Wymer v. Kemble* (a), there was a sale completed before the act of bankruptcy. *Notley v. Buck* (b) is in point: there the goods were seized before, but not sold till after, the act of bankruptcy; and it was held that the sheriff was not justified in paying over the money to the execution creditor, but that it belonged to the assignees.

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Hutchinson in reply. The plaintiff was not a creditor having security for his debt at the time of the bankruptcy, for the sale took place before the commission issued. The case is clearly within the eighty-first section, and the execution creditor is entitled to the property levied by seizure two months before the issuing of the commission, unless that right is divested by sect. 108. There are no express words taking away the right given by sect. 81., and that section being clear and distinct, ought not to be controlled by a subsequent one which is ambiguous.

DEKMAN C. J. The question submitted to the Court is, whether the execution was levied more than two months before the issuing of the commission, within

(a) 6 B. & C. 479.

(b) 8 B. & C. 160.

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the meaning of the 6 G. 4. c. 16. s. 81. We may assume that the execution was *bonâ fide*, the contrary not being imputed. The first point adverted to by the counsel for the plaintiff has been very properly abandoned by the defendant's counsel; for after the decisions which have taken place on the subject, it would be impossible to contend that the seizure by the sheriff in this case was not a levying within the act (a). Another question is, whether two calendar months elapsed between the levying of the execution and the issuing of the commission. The language of the eighty-first section is, "that all executions *bonâ fide* executed or levied more than two calendar months before the issuing of the commission, shall be valid, notwithstanding any prior act of bankruptcy." Now, if there had been no authority whatever on the subject, it seems to me, that we should be compelled by this section to ascertain with precision the time when the two things took place: first, the time at which the execution was levied, and secondly, the time at which the commission issued. Here, there can be no doubt that more than two calendar months did elapse between those two proceedings. The authorities which have been cited to this effect are decisive. *Ex parte Farquhar* (c) is precisely in point. There, on a petition by mortgagees praying for a sale, it appeared that one of the mortgages was executed on the 18th of *February* 1826; that the commission issued on the 18th of *April* following; and that an act of bankruptcy was committed before or on the 18th of *February* 1826. The Vice-Chancellor held, that the two calendar months expired

(a) See *Wray v. Lord Egremont*, *antè*, 122.

(b) 1 M. & M. 141.

(c) 1 Mont. & M. 7.

on the 17th of *April*; on the principle that, where the computation of time was to be from an act done, the day on which such act was done was to be included, and his judgment was afterwards confirmed by Lord Chancellor *Lyndhurst*. Now that is an express authority on the point in question; and consequently, this execution is protected by section 81., unless it comes within the proviso at the end of section 108. I am of opinion that section 81. having in such very distinct and general terms protected all executions bonâ fide executed or levied more than two months before the issuing of the commission, the words of section 108. are not sufficiently explicit to divest the execution creditor of the right previously given by section 81. The words of the 108th section are very large, so as to make it almost necessary to impose some limitation on their meaning. There would be great difficulty in contending, nor has it been insisted on the part of the defendant, that all acts of bankruptcy at any former period should over-ride executions of this sort. I think that section 108. does not so far control section 81., as to prevent its clear and distinct words from operating in a case of this description; I am therefore of opinion that the execution creditor, having levied his execution more than two months before the issuing of the commission, is entitled to the proceeds of the goods, and consequently that the sheriff made a false return, and that the plaintiff is entitled to recover.

PARKE J. I am of the same opinion. The facts of the case are shortly these: the plaintiff, who was creditor on a judgment entered up on a warrant of attorney, issued a fi. fa., and the sheriff, by eleven o'clock of the

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13th of *August*, seized the goods of the bankrupt, but did not sell until some time afterwards, and between twelve and one o'clock of the 13th of *October* the commission of bankrupt issued. The question is, whether the assignees or the execution creditor are entitled to the money produced by the sale of the goods. The first point is (supposing this to be a case within sect. 81.), whether the execution was executed or levied more than two calendar months before the issuing of the commission. Now, first, as to the meaning of the words *executed or levied*, that has been settled by numerous decisions, on the construction of the 21 *Jac.* 1. c. 19. s. 9., (where the words used are "served and executed,") which establish, that as soon as the sheriff seizes the goods, the execution is *executed*. The same construction must be put upon the words "*executed or levied*" in this statute, and therefore supposing the plaintiff to be entitled to the benefit of section 81., his execution was *executed or levied* by eleven o'clock of the forenoon of the 13th of *August*. The next question is, whether the commission was issued more than two calendar months from that time. Now, if the day of the act done is to be taken into consideration, as it should be, according to the argument adopted by the Master of the Rolls in *Lester v. Garland* (a), as applicable to that case, where the plaintiff is privy to the act, then the day of the seizure in this case must be reckoned as one, and, consequently, if the commission issued at any time on the 13th of *August*, it issued more than two calendar months after the execution. Upon this point *Ex parte Farquhar* (b), adjudged first by the Vice-Chan-

(a) 15 *Ves.* 248.(b) 1 *Mont. & Mac.* 7.

cellor Sir *J. Leach*, and afterwards by Lord *Lyndhurst*, is decisive. Substituting for “two calendar months” the words “one day before the issuing of the commission,” the case will be clear. As the 13th of *August* would be one day before, any time on the 14th of *August* would be more than one day. Besides, if here the fraction of a day be taken into account, (as it may be,) it would appear that more than two calendar months had elapsed between the time of the seizure and the issuing of the commission, that is, between eleven o’clock of the forenoon of the 13th of *August*, and twelve o’clock of the 13th of *October*, because sixty-one complete days, which are the two calendar months, would have elapsed by eleven o’clock of the 13th of *October*, and the commission did not issue till twelve or one o’clock of the afternoon of that day. Making the computation either way, the commission issued more than two calendar months after seizure, which is sufficient to entitle a creditor to a preference under this clause.

The next question is, what is the effect of sect. 108.? It appears to me that section 81. applies to all executions levied more than two months before the issuing of the commission, whether founded on judgments after verdict or on judgments by default or confession, the words of that section being general, and not in any way limited or qualified; and that the 108th section applies only to executions on judgments by default or confession, or *nil dicit*, where the seizure has taken place within the two calendar months before the issuing of the commission. That construction will reconcile the two sections of the act. The 108th section, however obscure in its terms originally, has now received a judicial construction which makes it tolerably clear.

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The creditor who has issued execution on a judgment after verdict, though within the two months, is entitled to a preference if the seizure was before an act of bankruptcy; but where the judgment is by default or confession, then, to entitle the creditor to a preference, there must have been a sale as well as a seizure (a).

TAUNTON J. I am of the same opinion. There is abundance of authority to shew that the law will advert to the fraction of a day; and that being so, the only question is, whether more than two calendar months did not elapse between eleven o'clock of the 13th of *August* and twelve at noon of the 13th of *October*. Now Lord *Holt*, in an anonymous case in 1 *Salk.* 44. (b), says that it has been adjudged (c), that if one be born the 1st of *February* at eleven at night, and the last of *January* in the 21st year of his age at one of the clock in the morning he makes his will of lands, and dies, it is a good will, for he was then of age. Then, if he become of age on the 31st of *January*, he of course must be above the age of twenty-one on the 1st of *February*. It follows by analogy, therefore, that more than two calendar months had elapsed at the time when this commission issued.

The next question is, whether the execution, notwithstanding the proviso of the 108th section, be within the protection of the 81st. The language of that section is very general, and applies to all executions whatever, executed two months before the issuing of the

(a) See *Wymer v. Kemble*, 6 B. & C. 479. *Notley v. Buck*, 8 B. & C. 160. Also *Crosfield v. Stanley*, *antè*, 87.

(b) Reported, 2 *Ld. Raym.* 1096. as *Fitzhugh v. Dennington*.

(c) *Herbert v. Torball*, *Keb.* 589. *Sid.* 162.

commission. This execution, therefore, is within its protection, unless it is expressly taken out of it by section 108. That section appears to me to apply to executions issued within two calendar months, or, in other words, to such executions as are not protected by section 81.; and if that be so, it is unnecessary to consider the cases in which a judicial construction has been put upon section 108. If that section were not limited by the eighty-first, there would be no period of limitation whatever; an execution issued on a judgment founded on a warrant of attorney, would be liable to be disturbed at the distance of many months, or even years, by an act of bankruptcy. It appears to me that the eighty-first section was intended to interpose a sort of statutable regulation, and to establish that where the two months had not begun, the execution should, in all cases whatever, be protected. I am of opinion, therefore, that the sheriff made a false return, and that the plaintiff is entitled to recover.

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PATTESON J. I am of the same opinion. There are three questions: first, whether, by the seizure of the bankrupt's goods, the execution can be said to have been executed or levied; secondly, if so, whether or not the two calendar months had elapsed between the 13th of *August* and the 13th of *October*; and, thirdly, whether section 108. applies to this case. The first point has been abandoned on the argument for the defendant, on the supposition that it was adjudged in *Giles v. Grover* (a); but the point there decided was, that by seizure under an execution, the property was not divested out of the defendant in the execution. It was

(a) 9 Bingham. 128.

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there pressed very much in argument, that by a seizure of the goods, an execution was always considered *executed* within the meaning of the 21 *Jac.* 1. *c.* 19. *s.* 9., and consequently that the property in the goods was thereby divested out of the debtor. But although it was admitted that ever since that statute the law had been, that by seizure the execution was executed, the consequence attempted to be deduced from it, that as soon as the seizure took place the property was divested out of the debtor, was denied. I think that never was the law. At all events, if it ever was so held, the contrary was decided in *Giles v. Grover* (a).

As to the second question, I entirely agree with my Lord, that if there had been no decision on the point, the language of the act requires that the precise time when the execution was executed, and the precise time at which the commission was issued, must be ascertained; and the case of *Ex parte Farquhar* (b) is quite decisive, that more than two months had elapsed in the present case, between the 13th of *August* and the 13th of *October*.

With respect to the third question it is sufficient to say that sect. 108. in my judgment does not apply to any case protected by sect. 81., and that makes it unnecessary to consider the propriety of the decisions which have taken place on sect. 108., which I believe has given occasion, within a few years, to more litigation than any section in any act of parliament ever did.

Judgment for the plaintiff.

(a) 2 *Bingh.* 128.

(b) 1 *Mont. & Mac.* 7.

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DOYLE *against* POWELL.

ASSUMPSIT on a policy of insurance upon goods and freight by the ship *Triton*, at and from *Liverpool* to *Monte Video* and *Buenos Ayres* if open, or her final port of discharge in the *River Plate*, (with liberty to wait two months at *Monte Video* if needful,) at a premium of five guineas per cent., to return 2l. per cent. for risk ending at *Monte Video* on arrival. The declaration averred a total loss by the perils of the seas. At the trial before Lord Tenterden C. J., at the *Middlesex* sittings after *Trinity* term 1831, the jury found a verdict for the plaintiff, subject to the opinion of this Court on the following case: —

The plaintiff was master and owner of the ship *Triton*, and being about to proceed upon the voyage after mentioned, caused the policy in question to be effected. The plaintiff sailed on board the *Triton* from *Liverpool* for *Monte Video* and *Buenos Ayres*, with a cargo, (consisting partly of goods of his own,) on the 7th of *May* 1828. The vessel arrived on the 2d of *August* at *Monte Video*, at which time there was a war between the government of the *Brazils* and that of *Buenos Ayres*, and a blockading squadron of the *Brazilian* government was stationed off *Monte Video*, between that port and *Buenos Ayres*, to prevent vessels sailing up the river to *Buenos Ayres*; but negotiations were pending, and a peace was shortly expected. The plaintiff having discharged part of his cargo at *Monte Video*, and taken in ballast and some goods for *Buenos Ayres*, took a convenient

Goods and freight were insured at and from *Liverpool* to *Monte Video* and *Buenos Ayres* if open, or the ship's final port of discharge in the *River Plate*, with liberty to wait two months at *Monte Video* if needful, at a premium of five guineas per cent., to return 2l. per cent. for risk ending at *Monte Video* on arrival. The vessel arrived on the 2d of *August* at *Monte Video*, which was then blockaded by an enemy's fleet to prevent vessels passing to *Buenos Ayres*. The blockade did not cease till the 4th of *October*. The vessel afterwards sailed for *Buenos Ayres*, and was lost: Held, that the risk was at an end as soon as the vessel had staid two months at *Monte Video*, and that the underwriters were, therefore, discharged.

5 B & C. 446.

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venient position for sailing, and was ready to sail for *Buenos Ayres* on the 28th of *September*, and would have proceeded thither, but that he was prevented as after mentioned. Intelligence arrived at *Monte Video* on the 12th of *September*, that peace had been made; but peace was not ratified until the 30th of *September*, and intelligence of that event was received at *Monte Video* on the 4th of *October*, on which day the blockade was raised, and until that day, the squadron remained off *Monte Video*, and no vessels with cargoes were allowed to clear out for *Buenos Ayres*. Those vessels which did sail were in ballast, and were cleared out for *Valparaiso*. On the 2d of *October*, notices were stuck up at the *Mole Head* and at the custom-house, that no vessels should leave *Monte Video* for *Buenos Ayres* without the payment of certain duties, as well upon the goods on board, as upon the goods landed, and from ten to fifteen days was the period fixed for such payment. The master (the plaintiff), on the 2d of *October*, applied to the consignees of his ship, as well as to other persons on shore, to pay the duties on his cargo, but without effect. On the 5th of *October* the plaintiff, taking advantage of a fog, clandestinely sailed from *Monte Video* for *Buenos Ayres* without having paid the duties: he arrived in the outer roads on the 6th of *October*, and, on the following day, in the inner roads, where the vessel was sunk with the goods insured on board. The defendant paid into Court 2 per cent. as a return of premium for risk ending at *Monte Video*. The question for the opinion of the Court was, whether, under the terms of the policy, the risk was determined by the stay of the plaintiff for more than two months at *Monte Video*? If the Court should be of opinion that

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it was, then a nonsuit was to be entered ; if otherwise, a verdict for the plaintiff for such sum as an arbitrator should award.

The case was argued during the present term.

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Kelly for the plaintiff. The risk was not determined by the stay of the ship at *Monte Video* (though for more than two months), under the very peculiar circumstances of this case. The waiting having been occasioned by the blockade, was not one contemplated by the policy in limiting the specified time to two months. The instrument must be construed so as to carry into effect the intention of the parties. Giving the construction contended for by the defendant, will have the effect of determining the risk, under whatever circumstances the staying longer than two months occurred. The intention of the parties, when they introduced into the policy the liberty to stay two months, was to substitute that express stipulation for the one which the law would otherwise imply; that the vessel should not wait more than a reasonable time. If there had been no express liberty to stay two months reserved by the policy, but a mere liberty to touch, and the vessel, having arrived at *Monte Video*, had been detained by a superior force for a considerable period, that would not have determined the risk; and if not, why should the express reservation of a liberty to stay two months have that effect?

Maule contra. The policy must undoubtedly be construed so as to give effect to the intention of the parties, but that intention (collected from the language of the instrument) was, that the risk should determine as soon

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as the vessel had remained two months at *Monte Video*. The voyage described in the policy is “from *Liverpool* to *Monte Video* and *Buenos Ayres* if open, or her final port of discharge in the river *Plate*, with liberty to wait two months at *Monte Video*, if needful.” The words *if needful* are construed by the plaintiff to mean “if the blockade continues;” but that is not their meaning. If the vessel had been at liberty to stay a reasonable time, that would have imported a liberty to stay as long as there was a detention by embargo. The vessel was not under restraint at *Monte Video*. She might have gone from thence, though not to *Buenos Ayres*. This case is something like *Browne v. Vigne* (a). There the ship was insured “from *London* to any port or ports in the *River Plate*, until her arrival at her last port of discharge in the *River Plate*,” and the master, intending to discharge her cargo at *Buenos Ayres*, passed *Maldonado*; but hearing that *Buenos Ayres* was then in the hands of the enemy, he went to *Monte Video*, with intent to make a complete discharge there if the market were suitable: he discharged a part, but not finding the market there so favourable as he expected, he had not abandoned his original intention of going to *Buenos Ayres*, if it should afterwards be practicable; while, however, he was still discharging part of his cargo at *Monte Video*, *Buenos Ayres* continuing in the enemy’s hands, a loss happened by a peril of the sea. It was held that the voyage ended at *Monte Video*. The effect of the leave to stay is in this case to put an end to the policy at the end of two months. It is in the nature of a warranty that the vessel shall not stay more than two months. Now

(a) 12 *East*, 283.

a warranty to sail on or before a particular day is not fulfilled if the ship does not completely unmoor on that day, though she then has her cargo on board, and is quite ready to sail, and is only prevented doing so by stress of weather, *Nelson v. Salvador* (a). The delay here was the cause of loss. Where a ship, being disabled by perils of the sea, put into port to repair, and the master was obliged to sell part of the goods to defray the expenses, that was held, (in an action on a policy *on the goods*,) not to be a loss by the perils of the sea, though they were the remote cause of it; the proximate cause being the want of funds to pay for the repairs, *Powell v. Gudgeon* (b), *Sarguy v. Hobson* (c). If it be held that the underwriters are liable on the policy as long as *Buenos Ayres* was closed, they will be liable to a greater risk than the parties intended.

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Kelly in reply. The words, "with liberty to stay two months at *Monte Video*," is not a warranty that the vessel shall not stay there longer than that time. In *Brown v. Vigne* (d) *Monte Video* was, at the time of the loss, the port of discharge. Here *Buenos Ayres* was the port of discharge at the time of the loss.

Cur. adv. vult.

DENMAN C. J. on a subsequent day in the term delivered the judgment of the Court. The only question in this case is, what is the meaning of the words, "with liberty to wait two months at *Monte Video* if needful." To decide that, we must consider what the effect would be if those words were omitted. The

(a) 1 M. & M. 309.

(b) 5 M. & S. 431.

(c) 2 B. & C. 7.

(d) 12 East, 283.

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vessel might have sailed to *Monte Video*, and have discharged her cargo there, without going to *Buenos Ayres*, and in that case there would have been a return of 2 per cent. premium, in consequence of the risk having ended at *Monte Video*; or if, on her arrival at *Monte Video*, *Buenos Ayres* had been open, she might have sailed to that port. If, however, that port was not open, but under blockade, she would not have been at liberty to wait at *Monte Video* till the blockade was over. The clause in question enables the vessel to remain at *Monte Video* for two months. It seems to have been the intention, that if the blockade had ended sooner, she should proceed to *Buenos Ayres*; but at all events, she could not stay longer than two months at *Monte Video*; though, if she had sailed at the end of two months, she would have been protected by the policy. No other construction can be put upon this policy, framed as it is. In order to construe it as required by the assured, words must be introduced, and it must be read as if the liberty was to stay two months *or longer*; but the latter words not being in the policy, we think that the vessel was at liberty to stay two months and no longer at *Monte Video*; and she having staid longer, the risk was determined at the end of the two months, and the underwriters are discharged.

Judgment for the defendant.

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The Duke of NEWCASTLE *against* The Hundred
of BROXTOWE.

Tuesday,
Nov. 20th.

THIS was an action on the statute 7 & 8 G. 4. c. 31., to recover damages for the felonious demolition in part of *Nottingham Castle*, by persons unlawfully, riotously, and tumultuously assembled. Plea, the general issue. At the trial before *Vaughan B.*, at the Summer assizes for *Nottingham*, two questions were made: first, whether *Nottingham Castle* was within the hundred of *Broxtowe*; and, secondly, assuming it to be so, on what principle the compensation given by the statute was to be calculated.

In an action on 7 & 8 G. 4. c. 31. against the hundred of *B.*, for the felonious demolition of *Nottingham Castle* by rioters, the plaintiff produced in evidence certain orders made by the justices at the quarter sessions for the county, in which the castle was described as being in that hundred. No proof was given that the justices who made those

orders were residents in the county: Held, that the orders were admissible as evidence of reputation, for that the justices, from the nature of their office, must be presumed cognizant of the subject.

It was proved by other evidence, that for nearly two centuries the castle of *N.* had been reputed to be within the hundred of *B.*

The defendants attempted to prove that the town of *N.* had been from the earliest period separated from any jurisdiction of, or connection with the adjoining hundreds, and for that purpose gave in evidence an extract from Domesday Book, in which the town was mentioned previous to the enumeration or description of the hundreds in the county, and various presentments during the reigns of *Ed. 1.*, *Ed. 3.*, and *Hen. 6.*, by the jurors of the town of *N.*, of deaths within the castle and its precincts; and they produced a charter of *Hen. 6.*, whereby the town of *N.* was made a county of itself, and the castle was specially excepted.

The Judge, after recapitulating all the evidence, told the jury that the excepting of the castle when the town was made a county, did not shew in what hundred the castle originally was; that the evidence of reputation given by the plaintiff was entitled to great weight, and that when things had gone on for two centuries in one uniform course, it was reasonable to infer that that course had prevailed from the earliest period, unless the evidence to the contrary was certain. It being objected that by this summing up too much weight was given to modern reputation, and too little to the ancient documents: Held, that the direction was proper.

Semble, that in assessing compensation for the demolition of a dwelling-house under 7 & 8 G. 4. c. 31., the jury ought to consider what sum will be necessary to repair the injury and replace the building in the state it was in when the outrage was committed; and not whether the plaintiff was likely to make it his residence, or whether it was suitable for such residence.

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close, the brewhouse, and the site, ground, and foundation of the castle mills, described as theretofore being part of the possessions of the castle of *Nottingham*; secondly, a grant of the 18th of *February*, 20 Jac. 1., whereby that king granted to *Francis* Earl of *Rutland*, inter alia, the castle of *Nottingham*, and the site, circuit, ambit, and precinct thereof, and the close called *Dovecott Close* in *Nottingham Park*, and a meadow called *King's Meadow*, lying in or near the liberties or precincts of the town of *Nottingham*; all which were described in the grant as parcel of the lands and possessions belonging to the king in right of his crown of *England*. The plaintiff then put in a series of documents, among which were the following:—An extract from the Hundred Rolls taken by special commission in the third year of *Ed. 1*. One of the articles of enquiry was of purprestures made upon the king, and by whom made, and under the head of “Wapentake of *Brokoltowe*” was this finding: That the Lord *Henry*, father of the Lord King *Edward*, made a certain weir across the river *Trent*, which had laid under water the meadow of the lord the king under the castle of *Nottingham*, and the meadow of the prior of *Lenton*. The land-tax assessments under the 4 *W. & M. c. 1.*, and office copies of duplicates of the assessments under the same from the year 1693 to 1744: in these the castle and brewhouse yard had been included as parts of *Broxtowe* hundred. Entries in a book of orders made at the quarter sessions in *April* and *October* 1654, and *January* and *April* 1655: in these it was stated, that the castle and brewhouse were in the hundred of *Broxtowe*, and the inhabitants of the hundred were thereby ordered to maintain certain poor people living under the castle and at the brewhouse, who had been previously relieved out of the
general

general county stock. The first two orders gave as a reason for their having been so relieved, that the brew-house and yard were not formerly known to be of any particular parish, but that they were then known to be in the wapentake of *Broxtowe*, and chargeable therewith to the relief of their own poor. Another order of the 1st of *January* 1660 was also given in evidence, to shew that on occasion of a robbery of *A. R.* in *Nottingham Park*, the justices, with the consent of the grand jury, &c. to save the expense of an action, ordered the money to be levied on the *hundred of Broxtowe*, and paid to the person robbed. It was contended that these orders were not admissible as judgments of the Court of quarter sessions, because the justices had no authority to make them; nor as evidence of reputation, because it was not proved that the justices resided in the county, or had any peculiar knowledge on the subject-matter; and, further, because it appeared from the orders themselves, that at the time when they were made, it had been matter of dispute whether the brewhouse yard was within the hundred or not. The learned Judge thought they were admissible as evidence of reputation. Evidence was then given of the call of a constable for "brewhouse yard," since 1696, among the constables for *Broxtowe* hundred; and that it had been included among the townships in the hundred in the county rate of 1818, and in orders of sessions made for payments of sums as compensation for injuries done, pursuant to the stat. 9 G. 1. c. 22. and 7 & 8 G. 4. c. 91.

The defendants attempted to shew that this was the first occasion (unless those mentioned in the orders of sessions about the time of the commonwealth were to be taken as proved) in which any direct charge had been made on the hundred in respect of the castle or its pre-

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cincts; and for this purpose they gave evidence, that the town of *Nottingham*, being an ancient royal burgh, had from the earliest period been always free from any jurisdiction of or connection with the adjoining hundreds; and they produced an extract from Domesday Book, in which there was a distinct entry of the town of *Nottingham* previous to the enumeration or description of the hundreds in the county, but no mention was made of the castle. They then proved that there had been distinct juries for, and distinct amerciaments upon the town and the several hundreds at various iters (assizes) during the reigns of *Ed. 1.*, *Ed. 3.*, and *Hen. 6.*; and in order to shew the connection of the castle with the town rather than with any adjoining hundred, they gave evidence of presentments during those reigns by the jurors of *the town of Nottingham* as to deaths at the castle, and at the king's mill in the precincts of the castle; and after producing various documents to shew the possession of the castle by the crown from the earliest period of legal memory to the reign of *Hen. 6.*, they put in a charter of the twenty-seventh year of that king, by which the town of *Nottingham* was declared to be a county of itself, apart from the county of *Nottingham*, but the castle was specially excepted.

As to the value of the building, the plaintiff called one witness, who stated that the cost of restoring the castle would be 31,280*l.* The defendants called *Mr. Henry Wood*, a *Nottingham* architect, *Mr. Nicholson*, a builder of *Southwell*, and *Mr. William Cubitt*, a *London* builder. *Mr. Wood* had made estimates of the damage on three principles; the first, taking the net rental which appeared in evidence to be 171*l.* per annum, and which, at thirty years' purchase, would amount to 5130*l.* The next was made with reference to the sale of the materials,

rials, which he estimated at 5081*l.*; and the last calculation proceeded on the principle of restoration, which he thought could be done for 15,386*l.* Mr. *Nicholson* concurred in this latter estimate. Mr. *Cubitt* estimated the price of restoration at 21,000*l.*

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The defendants proved also, that the castle of *Nottingham* had not been occupied by the plaintiff or any former owner for more than a century; that it had become unfit for the residence of the plaintiff's family by reason of several steam-engines having of late years been erected near it, and of the plaintiff himself having sold ground immediately adjoining to it, and having let portions of the park on building leases. The castle itself had been divided into two dwelling-houses, which together let at the net rent above stated.

The counsel for the defendants, in his address to the jury, contended, first, that the documentary evidence of the connection of the castle with the town, and of the independence of the town of any hundred, were entitled to much greater weight than the evidence of reputation given by the plaintiff; and, secondly, upon the question of damages, that the true principle of compensation was, taking the net annual rent to be the criterion of the annual value, to give a reasonable number of years' purchase on that value.

The learned Judge directed the jury, first, to find for the plaintiff if they thought upon the evidence that the castle was locally situate within the hundred of *Broxtowe*; and he recapitulated all the evidence, and observed, upon the charter of *Hen. 6.*, that leaving the castle in the county of *Nottingham*, when the town was made a county of itself, did not shew in what hundred the castle originally was, and that the orders of sessions and the

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Land-tax duplicates were entitled to great weight, as shewing that, in point of reputation, the castle had, for two centuries, been considered part of the hundred; and he added that, when things for a great length of time had gone in a certain course, it was reasonable to infer that they had always done so, unless the evidence to the contrary were certain. The question of damages he left generally to the jury. They found for the plaintiff, damages 21,000*l*. In the early part of the term

Wilde Serjt. moved for a new trial. The orders of session were not admissible even as evidence of reputation, because it was not shewn that the justices by whom they were made were resident in the county, or had any peculiar knowledge as to the question whether the castle and its precincts were within any particular district or division of the county; and in one of those orders it expressly appears to have been matter of controversy at a former period whether the brewhouse yard were or were not formerly within the hundred of *Broxtowe*. The learned Judge did not present the case to the jury as he ought to have done, for he gave too great weight to the evidence of modern usage and reputation, and too little to the ancient documents produced on the part of the defendants. The damages were excessive. The stat. 7 & 8 G. 4. c. 31. s. 2. entitles the party damnified to full compensation. The learned Judge ought to have stated to the jury the principle upon which that compensation ought to be calculated. They assessed the damages on the principle that the plaintiff was entitled to have the castle rebuilt. Now that may be properly applied to buildings used by the owner for the purposes of habitation; but *Nottingham*

ham Castle had not for a century been so used by its owner. It was not an ancient possession of the family of the present duke, nor granted to them by the crown, but purchased between 1660 and 1680 from the Earl of *Rutland*: and the plaintiff had clearly no intention of living in it, for he had granted the land adjoining upon building leases. The rental is the proper criterion of the annual value of a building; and the compensation to which the plaintiff was entitled was a reasonable number of years' purchase upon the rental actually produced by the castle.

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Cur. adv. vult.

PARKE J. now delivered the judgment of the Court.

In this case, my Brothers *Taunton* and *Patteson* and myself, before whom the motion for a new trial was made (my Lord Chief Justice not having at that time taken his seat on the Bench), are of opinion that no rule should be granted.

The first objection was, that certain orders of sessions, in number five, and made between the years 1654 and 1660, each inclusive, were improperly received in evidence.

These documents were admitted, not as orders upon matters over which the magistrates had jurisdiction, but as evidence of reputation; and in that point of view we are of opinion that they were admissible. Four of them contain an express statement, the fifth an implied one, that the castle (or the brewhouse, or the park of *Nottingham* which belong to it) is within the wapentake or hundred of *Broxtowe*: the statement is made by the justices of the peace, assembled in sessions, who, though they were not proved to be residents in the county or hundred, must, from the nature and character of their

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offices alone, be presumed to have sufficient acquaintance with the subject to which their declarations relate; and the objection cannot prevail, that they were made after a controversy upon that subject had arisen, because there appears to have been no dispute upon the particular question whether the castle and its precincts were in the hundred of *Broxtowe* or not. These statements, therefore, fall within the established rule as to the admission of evidence of reputation.

The second objection was, that the learned Judge did not present the question to the jury in the manner in which he ought to have done; not that he misinstructed them in point of law, but that, in observing upon the facts, he ascribed too great weight to the evidence of modern usage and reputation, and particularly to the above-mentioned orders, and too little to the ancient documents produced on the part of the defendants. But we must receive with very great caution objections of this nature; for if we were to yield to them on all occasions in which we might disagree with some observation made on particular parts of the evidence, upon which it is the province of the jury to decide, we should seldom have any case which involved many facts brought to a termination. It is only in those cases in which we are satisfied that the jury have been led to a wrong conclusion that we ought to interfere; and we cannot possibly say that they have been induced to form a wrong conclusion in this. Without meaning to say that the learned Judge was wrong in attaching great weight to these particular documents, we all agree that the general scope of his observations upon the evidence was perfectly correct. We understand him to have said, in substance, that as by the usage and reputation

ation for nearly two centuries, the castle and its precincts had been considered as being within the hundred, it ought to be inferred that they were *legally* so, unless the ancient documents clearly and satisfactorily proved that they were not. This is only an example of the principle which is applicable to all rights of way and common, to tolls, to moduses, in short, to all prescriptive and ancient rights, customs, exemptions, and obligations : in all which long usage should always be referred, if possible, to a legal origin ; and it is only by the constant practical application of this principle that much valuable property and many important rights and privileges are preserved.

In adapting this principle to the present case, there being strong and uniform evidence of modern usage since the middle of the seventeenth century, the only question is, whether the older documents *clearly* shew that this usage is wrong, and that the castle and its precincts could not have been within the hundred at the time of the first institution of that division ? Now these documents prove, that from an early date, viz. at the time of Domesday, there was a borough of *Nottingham* : that the borough in later periods had a jury distinct from that of the hundred ; one of them in the 3 *Ed. 3.* tends to shew that the castle was within the jurisdiction of that jury ; and the charter of *Hen. 6.* may be considered as demonstrating, that at the time of the erection of the borough into a county of itself the castle did, for some purposes at least, form a part of the borough, for the borough is made a county with the exception of the castle. But admitting this, what reason is there, why the castle, though being in the borough for some purposes, might not also be a part of

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of the hundred? for as a borough may include a part of two counties (the city of *Oxford* and borough of *Tamworth* for example), why may it not comprise part of a hundred, or part of two or more hundreds? and may we not also reconcile the exclusion of the castle from the new county, on the supposition that it had originally belonged to the hundred? We do not think that any of these documents are so clearly inconsistent with the long usage and reputation in modern times as to prevent a jury from drawing the usual inference, that what has existed so long has existed from the earliest period necessary to give it validity.

It remains to consider the third objection, that the damages are excessive. This question is peculiarly for the consideration of a jury, and nothing has been said to induce us to think that they have proceeded on an erroneous principle of calculation: certainly, if that principle had been pursued which was contended for by the learned counsel who moved for the rule, it would have been so; for the jury would have done wrong to take into their consideration, whether the castle was an ancient possession of the noble family of the plaintiff or not, whether the plaintiff was likely to reside there, and whether the neighbourhood was suitable to such a residence. The true question is, what sum of money will repair the injury done by the mob? what will replace the house in the situation and state in which it was at the time of the outrage committed, as nearly as practicable? There seems every reason to believe that the jury have acted on this principle; and if so, they have done rightly. At any rate, it is impossible for us to say they have done wrong.

Rule refused.

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EJECTMENT. At the trial before Lord *Tenterden* C. J., at the *Middlesex* sittings after *Hilary* term 1832, a verdict was taken for the plaintiff as to the premises comprised in the deed of settlement next mentioned, subject to the opinion of this Court upon the following case : —

By indentures of lease and release and settlement, bearing date the 2d and 3d of *July* 1708, *Thomas Allen* conveyed to *Edward Noell* and *Thomas Rowney* and their heirs, the manor or lordship of *Bibbesworth*, otherwise *Finchley*, in *Middlesex*, and other hereditaments in *Finchley*, to the use of *Allen* and his heirs until the marriage then intended to take place between him and *Martha Noell*, and afterwards to the use of *Allen* and his assigns for his life; remainder to the use of trustees during the life of *Allen* to preserve contingent remainders; remainder to the use of *Martha Noell* and her assigns for her life, for her jointure, and in bar of dower; remainder to the use of other trustees for the term of 500 years, upon the trusts declared in the said settlement for raising 4000*l.* for portions for younger

Estates were settled to certain uses, with remainder to trustees for 500 years, to raise portions for younger children, remainder to the use of the first and other sons successively of the settlor in tail male, remainder to his heirs and assigns for ever. The estate came, by virtue of the settlement, to *Edward*, the settlor's eldest son, who also became the reversioner in fee. He levied a fine to his own use in fee, and devised the estates in trust for *Thomas*, his brother, for his life, remainder to the use of *Thomas*, his brother's son, for life, remainders to the

sons of the last-mentioned *Thomas* successively in tail male; remainder to the use of *E. C.* in fee. *Edward* died without issue in 1774. *Thomas*, the brother, suffered a recovery in the same year, devised the estates to *Thomas*, his son, for life, with remainder over, and died in 1780. *Thomas*, the son, entered on his father's death :

Held, that *Edward*, being the tenant in tail, possessed of the immediate estate of freehold, was not precluded by the term of 500 years from levying a fine, which worked a discontinuance of the remainders; and that he thereupon acquired a tortious fee, which he might devise as above :

Held also, that the entry of *Thomas*, the nephew of *Edward*, on the death of his father, did not remit him to the reversionary estate formerly vested in *Edward*.

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children; remainder to the use of the first and other sons successively of the said *Allen* by the said *Martha Noell*, in tail male; remainder to the use of the heirs and assigns of *Allen* for ever.

The marriage took place; and there was issue thereof two sons, *Edward Allen* and *Thomas Allen*. *Thomas* afterwards took the additional surname of *Greenalgh*: and in 1752 he married *Ann Edwards*, upon which occasion the £1000. to which he would be entitled on his father's death under the above-mentioned settlement, as the youngest child of his father's marriage with *Martha Noell*, was settled on certain trusts in favour of himself and the said *Ann Edwards* and their children, but no assignment of the term of 500 years was ever made. By an order of Court in the present cause, the defendants were not to set up this term against the plaintiff's title.

Martha Noell (afterwards *Allen*) died in 1755, and *Thomas Allen*, the settlor, in April 1764, whereupon the reversion in fee in the said manor and hereditaments descended to his eldest son *Edward Allen*. In July 1764 *Edward* covenanted to levy a fine sur cognizance de droit come ceo, &c. to certain parties and their heirs, of the said manor, &c. to enure to the use of him, *Edward*, in fee; and the fine was levied accordingly in *Trinity* term, 4 G. 3., and duly proclaimed.

Edward Allen, in 1773, devised the estates above mentioned to *John Gould* and *Edward Wynne* and their heirs, to the use of the said *Gould* and *Wynne* and their heirs during the life of *Thomas Allen Greenalgh*, his brother, in trust for the said *T. A. Greenalgh* and his assigns during his life; remainder to the use of *Thomas Allen*, son of *T. A. Greenalgh*, and his assigns, for his life.

life; remainder to the trustees during the life of the last-mentioned *Thomas Allen*, to preserve contingent remainders; remainders (which it is unnecessary to state particularly) to the use of the first and other sons of the last-mentioned *Thomas Allen* successively in tail male, and afterwards to the use of the daughters; remainder to the use of the Honourable *Thomas Noell* in fee, in case he should be living at the time of the failure of issue of the last-mentioned *Thomas Allen*, but if he should be then dead, to the use of the Rev. Dr. *Edward Cooper* (through whom the lessor of the plaintiff claims) in fee.

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Edward Allen died in 1774, without issue; and thereupon his brother, *T. A. Greenalgh*, entered upon the said manor and hereditaments, and enjoyed the same till his death. By lease and release of the 15th and 16th of April 1774 the said *T. A. Greenalgh* conveyed the same to *Henry Wilmot* and his heirs, to the intent that *H. W.* might be tenant to the præcipe in a recovery to be suffered thereof as in the said release was mentioned; and it was therein declared that the recovery should enure to the use of *T. A. Greenalgh* in fee. A common recovery was suffered accordingly, in *Easter* term, 14 G. 3.

T. A. Greenalgh, by his will executed in July 1774, devised the said manor and hereditaments to his said son *Thomas Allen* and his assigns during his life, with divers remainders over, which failed of effect, and ultimately in fee to the right heirs of Sir *Thomas Allen*, grandfather of the first-mentioned settlor.

T. A. Greenalgh died in 1780 without any issue but the said *Thomas Allen*, who thereupon entered on the said manor and hereditaments, and enjoyed the same till his death, which happened in 1830: he never had any issue; and he survived the Honourable *Thomas Noell*,

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Ynell, mentioned in the will of *Edward Allen*. On the death of the last-mentioned *Thomas Allen*, the defendants entered, and have continued in possession ever since. Dr. *Edward Cooper* died in 1792, leaving the lessor of the plaintiff his heir at law. The defendants were admitted to be the right heirs of Sir *Thomas Allen*. Either party was to be at liberty to turn the case into a special verdict.

Follett for the plaintiff. The question upon which the case turns is, whether *Thomas Allen Greenalgh* was able to make a good tenant to the præcipe in the recovery suffered by him in 1774? and the plaintiff contends that he was not, inasmuch as the fine previously levied by his brother *Edward* discontinued the estate tail and displaced the remainders. *Greenalgh*, therefore, had no estate which he could convey so as to make a tenant to the præcipe, but only a remedy by formedon in the remainder, on the failure of the estate tail. The fine divested the immediate remainder in tail which he had, and *Edward* acquired a base fee, which he devised; and the reversionary fee was also in him. This view of the case is consistent with the law of discontinuance as stated by Lord *Coke* in commenting on *Littleton*, sect. 592.

W. Hayes, for the defendants, was here called upon by the Court to state the points on which he relied. First, the fine was not a discontinuance of the estate tail, because *Edward*, who levied it, was not tenant in tail in possession, there being a term of 500 years outstanding. [*Parke J.* That is removed out of the case by the order of Court.] It is not set up by way of a defence in the ejectment; but it may be adverted to in argument, to shew what was the state of the title at the time

time of the fine. Secondly, if the fine operated as a discontinuance, it discontinued the reversion in fee which was in *Edward Allen*, and turned it to a right; that reversion then was no longer devisable; it did not pass by *Edward's* will; and the lessor of the plaintiff cannot in any degree found his title upon it.

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Follett. If the first objection could prevail, scarcely any fine levied by a tenant in tail would be effectual, for such fines are generally of old estates out of which terms of this kind have been granted and are subsisting. Perhaps such a term may not be affected by the fine, or it may be, that the termor would be entitled in equity to have it kept up; but the fine still works a discontinuance. This agrees with the distinction laid down in all the books, that where tenant in tail levies a fine, after an estate of freehold granted, there is no discontinuance, but otherwise where there is only a term of years outstanding. *Com. Dig. Discontinuance*, (C) 3., citing *Co. Litt.* 332 b. The law on this subject is collected in *Cruise on Fines*, p. 192, 193. 2d ed., where it is stated, that in *Saffyn's* case (a), "it was resolved, that although a lessee for years had not himself such an estate as would enable him to levy a fine, yet it did not therefore follow that his interest should not be barred by a fine; that a term for years was within the statute 4 *Hen.* 7. c. 24., being comprehended under the word *interest*; and as the object of that act was to prevent strifes and debates, it would not have that effect, if its operation did not extend to long terms of years which are now so common." The doctrine on this head is further explained and com-

(a) 5 *Rep.* 124. *Cro. Jac.* 60.

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mented upon in *Iseham v. Morris* (a) and *Dighton v. Greenvil* (b), also cited by Mr. Cruise in the passage above referred to (c): *Reynolds v. Jones* (d) is an additional authority on the same point. There have been questions as between the termor and the person levying a fine, with respect to the operation of such fine upon the term; but it has never been suggested that the fine, levied by a tenant in tail, was prevented by such term from taking effect upon the estate tail.

As to the second point, it seems to be assumed, on the other side, that the lessor of the plaintiff founds his title wholly on the reversionary fee which was in *Edward Allen* before the levying of the fine. But this is a mistake. The fine levied by *Edward* gave him a new estate in fee, which displaced the remainders, and could, itself, only be divested by an action in formedon brought by the remainder-man on the failure of issue in tail of the party levying the fine. It is like the case of a disseisin under the old law. On the death of *Edward*, *Thomas*, the brother, might have brought his real action; but he suffered five years to elapse after his right accrued without doing so. With regard to the operation of a fine, as working a discontinuance and giving a new estate, *Doe dem. Odiarne v. Whitehead* (e) is a leading authority. If, indeed, at the time of levying the fine, *Edward* had had the immediate reversion in him, the effect of the fine would have been to bring that reversion into possession; but here there was a remainder interposed, namely, the remainder in tail to *Thomas* the brother. *Edward* then acquired an estate which was

(a) *Cro. Car.* 110.(b) 2 *Vent.* 329.(c) And 5 *Cruise Dig.* 185, 186.(d) 2 *Sim. & St.* 206.(e) 2 *Burr.* 704.

defeasible,

defeasible, but was not defeated within the proper time; having the fee, he devised it with remainder, ultimately, to Dr. *Cooper*; and upon the determination of the other estates limited by the will, the heir of Dr. *Cooper* became entitled to the estate in fee created by the fine. The Court will not presume, in favour of the defendants' claim, that a formedon was brought by *Thomas*, the brother, within five years of *Edward's* death.

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W. Hayes for the defendants. First, the fine did not work a discontinuance. The original settlement, under which both these parties claim, created a term of 500 years, which is admitted to have been still subsisting in 1764, when the fine was levied. Now a fine, to operate as a discontinuance, must be levied by a tenant in tail not merely seised, but having actual corporeal possession. [*Taunton J.* Is there any authority for saying that there must be a possession, as contradistinguished from seisin of the freehold? There have been many cases where the question was, whether a prior term was barred by a fine, but in which, according to this argument, such a point need not have arisen, since the term would have rendered the fine invalid.] It is only contended here that such fine could not have a tortious operation, by creating a new and wrongful fee, while the possession continued in the termors. In *Doe dem. Maddock v. Lynes (a)*, a party who had assigned a term in lands upon certain trusts, afterwards, and during the term, made a feoffment of the same lands; and it was held that such feoffment did not destroy the term and give a fee by disseisin, being made without the consent of the

(a) 5 B. & C. 388.

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trustees, and they being at the time entitled to actual possession under the assignment. If the feoffment did not work a disseisin in that case, the fine does not create a discontinuance in this: there is no substantial distinction. The clear, undisputed possession in this case was in the termors: the tenant in tail was such tenant, expectant only on the determination of the 500 years; the termors had the immediate right; and during the 500 years the subsequent estates limited by the settlement, were, in the view of this Court, and with reference to the immediate enjoyment, merely equitable. [*Taunton J.* In *Doe dem. Maddock v. Lynes (a)*, the attempt was to destroy a term assigned in trust for certain purposes, without the assent or knowledge of the trustees. If the feoffment had been made by the trustees themselves, and not by the cestuy que trust behind their backs, the Court might have come to a different conclusion.] The present case differs from that, because here the term was not created by the party afterwards wishing to destroy it, but was a prior term, forming part of the inheritance transmitted by the original settlor, and of which the estate tail itself was part. It was admitted by Mr. Preston in *Doe dem. Maddock v. Lynes (b)*, that if the term continued, the termor's possession was the possession of the reversioner: so here, the possession of the termors for 500 years was a lawful possession of the whole inheritance, parcelled out as it was by the settlement into a number of particular estates to the uses there specified. No actual entry was necessary by the termors, because, the limitation of the term being by way of use, it was executed in possession at the moment

(a) 3 B. & C. 388.

(b) Ibid. 398.

of executing the conveyance. It must be assumed on the other side, that the fine operated adversely to the termors: to operate as a discontinuance, it must have displaced the term. It is impossible to acquire a new reversion expectant on an old term: the termor must be dispossessed, *Freeman v. Barnes* (a). In that case it was held that the term was divested, there being proof of an intention to dispossess the lessee in trust: and it being objected that such a decision would prevent a man who purchased land by fine, from keeping on foot mortgages and leases, which it is often convenient to do, "the Chief Justice declared his opinion that in that case the fine should not bar, there not being any intention of the parties to that purpose." Discontinuance is, in its nature, a wrongful act; a tortious passing of the fee simple; *Litt.* 599. 612. 614.: the argument then on the other side must be, that the fee simple was so wrongfully passed by force of the fine, while at the same time a rightful possession continued in the termors; which is a contradiction. [*Taunton J.* Is there any case to shew that a party, to create a discontinuance, must be in actual possession of the land?] He must be in such possession as would enable him to make a feoffment with livery of seisin. There could not be a tortious acquisition of a new fee (which is the effect of a discontinuance), while the old title continued. Here the termors were in possession under the old term down to the time of bringing this ejectment. They had, if not the actual, the constructive possession; as was said by *Bayley J.* in *Doe dem. Maddock v. Lynes* (b), "The trustees were entitled to the actual possession, and we must therefore

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(a) 1 *Ventr.* 55. 80.(b) 3 *B. & C.* 405.

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presume that they had it." *Edward Allen* in this case was tenant in tail in remainder, expectant on the term of years, and consequently had no title to the possession. This is clear from *Litt. s. 60.*, and Lord *Coke's* commentary on that section, *Co. Litt. 49. a.* Now a tenant in tail, to discontinue by fine, must have the actual, and also the lawful possession of the land, *Co. Litt. 333. b.*, *Briscot v. Chamberlain (a)*. [*Parke J.* You contend that *Edward Allen* was tenant in tail in remainder, when he levied the fine.] He was; and not in possession in the sense contemplated by the books. And if a new fee was acquired here by the fine, it must have ransacked the whole inheritance: the tenant in possession must have been ousted: as *Bayley J.* said in *Roe dem. Truscott v. Elliott (b)*, there can be no ouster of a mere reversion. And, on the other hand, it has been already observed, that 'the term of 500 years was not one created by the tenant in tail, but was part of a chain of limitations created by the settlor, the common author of them all: and if this link remains, all remain. [*Denman C. J.* Have you any authority for the distinction between a term created by the tenant in tail and by the original settlor?] No direct authority, but it rests on principle. The possession of the termor in this case was the lawful possession of all those in remainder or reversion; while it continued there could be no tortious alienation. [*Taunton J.* again enquired if there were any authority for saying that a tenant in tail must be in actual possession of the land to discontinue.] In *Baker v. Hacking (c)*, tenant in tail and reversioner made a lease for the life of the lessee at a pepper-corn rent, and,

(a) *Moore*, 255.(b) 1 *B. & A.* 86.(c) *Cro. Car.* 587. 405.

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the lessee surviving the tenant in tail, this was held to be a discontinuance of the estate tail and the reversion, inasmuch as it was only the lease of the tenant in tail, since "the livery is only made by the tenant in tail, for he hath the sole power of the immediate freehold, and the immediate possession and inheritance." And the law is stated accordingly in the text books on the subject of discontinuance. [*Taunton J.* In *Cruise on Fines*, p. 254. 2d edit. it is merely said that "no person can create a discontinuance who is not in the actual possession of the estate tail by force of the entail." What is there to shew that the tenant in tail had not that in the present case?] Possession must be understood in the strict legal sense: the party must have the immediate right of possession. Here the termor had that possession, and represented the whole inheritance. One test of the nature of the tenant in tail's interest is, whether it could have passed by grant? and clearly it could here. If *Edward Allen* had granted his estate tail to a stranger, that party would, by the grant, have acquired a base fee, which would have expired on failure of issue in tail. But if *Edward* had an estate in possession, that estate could not have passed by deed alone, nor without livery. It is laid down in *Co. Litt.* 332. a. (referring to sects. 615, 616, 617. of *Littleton*) that "if a remainder or a rent service, or a rent charge, or an advowson, or a common, or any other inheritance that lieth in grant be granted by tenant in tail it is no discontinuance." And in *Litt. s.* 618.,—"Of such things as pass by way of grant, by deed made in the country, and without livery, there such grant maketh no discontinuance, as in the cases aforesaid, and in other like cases, &c. And albeit such

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things be granted in fee, by fine levied in the king's court, &c. yet this maketh not a discontinuance." The same doctrine is laid down in *Com. Dig., Discontinuance*, (C) 3. citing the above section, and 2 *And.* 110. And Lord *Coke* in commenting on the last-mentioned section says, "It is a maxim in law that a grant by deed of such things as do lie in grant and not in livery of seisin, do work no discontinuance." *Co. Litt.* 332. a. [*Taunton J.* The first estate of freehold was in *Edward*. Would that have passed by a common grant?] Such a grant would operate as a grant of the remainder or reversion, as deeds often do, which would be inoperative but for an outstanding term of years. [*Patteson J.* You contend that wherever there is a term of years outstanding, there can be no estate in possession in the freehold.] The argument goes that length. The estate for years and the estate in fee, carved out of the same inheritance, "subsist together, the one in possession and the other in expectancy." 2 *Blac. Com.* 164. [*Patteson J.* As to the possession of the land, no doubt that is so.]

But, secondly, if the fine worked a discontinuance, it divested the reversion in fee, and turned it into a right of action; that right, not being a devisable interest, could not pass by *Edward Allen's* will, but descended to the right heirs of the settlor, that is to the defendants, who are admitted to be the right heirs of Sir *Thomas Allen*. Upon the death of *T. A. Greenalgh, Thomas*, his son, being in of the legal estate, was remitted to the original estate tail under the settlement, and consequently to the reversion expectant on that estate tail; and on his death the reversion became vested in possession in the defendants. Where tenant in tail with immediate reversion in fee levies a fine, the reversion becomes
a right,

a right, and such right is extinguished in the fee acquired by the fine. It is not correct to say that the reversion is accelerated. The title acquired by the fine is founded, not on the reversion, but on the fee which is derived from the seisin of the estate tail, and rendered indefeasible by the reversion being reduced to a right. It is true, all charges upon the reversion are let in; but that is only because, the title being perfected by the extinction of the reversion in fee, it would be unjust that such title should not be subject to the incumbrances of the reversion. In the present case *Edward*, who levied the fine, was not the immediate reversioner; there was a remainder interposed, and consequently the effect of the fine was, not to give him a fee-simple by the reversion becoming merged, but to discontinue the reversion. In *Baker v. Hacking* (a), tenant in tail and reversioner in fee joined in a lease not warranted by 32 H. 8. c. 28., and it was held that the reversion was discontinued, and the reversioner, having only a right, could not devise it. That case is, in principle, the same as this; only, here, the tenant in tail was himself the reversioner, but with a remainder interposed between the estate tail and the reversion. Then, however, it is contended, that although the reversion was turned into a right of action, which could not be devised, the tortious fee acquired by virtue of the fine was devisable, and had not been put an end to. Now, the defendants do not say that *Thomas Allen Greenalgh*, by his possession under the will of *Edward*, was remitted to an estate in fee claimable under the original settlement; for, by *Edward's* will, the legal

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interest was devised to trustees. But the estate limited to *Thomas*, the son of *T. A. Greenalgh*, was a legal estate: and on the death of *T. A. Greenalgh*, *Thomas*, the son, had both the legal estate for life, and a right, by remitter, to the estate tail under the settlement, and to the reversion. Either, then, the remainders limited by the original settlement were not discontinued; or, if they were, the reversion also was discontinued, and, not being devisable by *Edward*, it descended upon the right heirs of the settlor, and came into possession when the legal estate vested in them. In either case there is a sufficient answer to this action.

Follett in reply. As to the first part of the argument, there is no ground for saying, that because the tenant in tail had not an actual bodily possession, his fine did not divest the remainder. All that is meant, when the books lay it down that the tenant must be in possession by virtue of the entail, is, that he must be actually seised of the freehold; he must have seisin of the estate tail by virtue of the entail itself, otherwise there is no discontinuance. It was so held in *Driver dem. Burton v. Hussey* (a). According to the argument on the other side, no fine could work a discontinuance where there was a term of years or a tenancy from year to year. The authorities cited only shew that a fine cannot so operate where there is an estate of freehold outstanding. In *Doe dem. Maddock v. Lynes* (b), the question was, as to the operation of a feoffment to bar a term, and the Court decided that it did not so operate, because it was a feoffment made tortiously, without the

(a) 1 H. Bl. 269.

(b) 5 B. & C. 388.

assent of the termors. In *Baker v. Hacking* (a), the reversion was expectant on a freehold. The like answer applies to *Briscot v. Chamberlaine* (b). To shew that the interest of the tenant in tail in this case (a freehold limited after a term of years), was a remainder which would pass by grant, reference was made to a passage in *Co. Litt.* 332. a. But the context is as follows: "It is a maxim in law, that a grant by deed of such things as do lie in grant, and not in livery of seisin, do work no discontinuance. But the particular reason is, for that of such things the grant of tenant in tail worketh no wrong, either to the issue in tail, or to him in reversion or remainder." But "reversion or remainder" there, means reversion, &c. expectant on an estate of freehold; and this is proved by another passage in the same page. "If tenant in tail make a lease for years of lands, and after levy a fine, this is a discontinuance; for a fine is a feoffment of record, and the freehold passeth. But if tenant in tail maketh a lease for his own life, and after levy a fine, this is no discontinuance, because the reversion expectant upon a state of freehold which lieth only in grant passeth thereby." In *Com. Dig., Discontinuance*, (C) 3., and the authorities there cited, the rule established is, that a fine by tenant in tail does not operate where the estate tail is expectant on a freehold estate; and it is there said, that "if it be after a lease by him for years, it will be a discontinuance; for then the freehold passed by the fine, and all the estates are displaced." Whether or not the reversion expectant on a term of years will pass by grant, it is unnecessary to discuss; the question here is, whether the party was

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(a) *Cro. Cur.* 387. 405.(b) *Moore*, 255.

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seised of the freehold by virtue of the entail: if the existence of a prior term of years prevented a discontinuance, scarcely any fine would be effectual, since there is hardly a case where the tenant in tail levying a fine is in actual bodily possession of the land. It was contended that this was not a discontinuance, because a tortious title was acquired by the party levying the fine; but without discussing this, (though a distinction is drawn in the books between an estate so acquired and the wrongful estate gained by a disseisor, and in fact the fine only enables a tenant in tail to aliene his estate as, before the statute de donis, he might have done without any fine,) it is sufficient to say, that the effect of a fine to give a complete estate in fee, capable of being conveyed or devised as such, has long been recognized, and no new rule can be introduced upon the subject.

As to the other point; it is contended that the ultimate reversion, which was in the right heirs of the settlor, (not in those of Sir *Thomas Allen*, though it is assumed on the other side that both are the same,) and which reversion descended to *Edward Allen*, was divested by the fine; and this may be conceded. But *Edward* had a new estate in fee by that fine: and as to the supposed remitter of *Thomas*, the son of *T. A. Greenalgh*, that, if *Thomas* entered under the will of his father, was barred by the father's recovery, so long as the recovery (although bad for want of a proper tenant to the præcipe) continued unreversed. The doctrine is thus laid down in *Co. Litt.* 349. *a.* "Here it is to be understood, that regularly a man shall not be remitted to a right remediless, for the which he can have no action; for *Littleton* here saith, that there is no person against whom the issue, when he cometh

cometh to the land without folly may bring his action; and saith also, that this is the principal cause of the remitter; for neither an action without a right, nor a right without an action, can make a remitter. As if tenant in tail suffer a common recovery in which there is error, and after tenant in tail disseiseth the recoveror and dieth, here the issue in tail hath an action, viz. a writ of error; but, as long as the recovery remaineth in force, he hath no right, and, therefore, in that case, there is no remitter." But, in fact, *Thomas Allen* the son, if he took an estate at all, took under the statute of uses by virtue of *Edward's* will, and therefore cannot avail himself of a remitter: for that purpose he should have waived the right of entry under the statute, and brought a real action. A remitter only takes place where the defeasible estate has come to the party without his own concurrence; the doctrine is, that there must have been no "folly" in him. In *Co. Litt.* 348. b. it is said, "Since *Littleton* wrote, and after the statute of 27 *H. 8.* c. 10., if tenant in tail make a feoffment in fee to the use of his issue being within age, and his heirs, and dieth, and the right of the estate tail descend to the issue being within age, yet he is not remitted, because the statute executeth the possession in such plight, manner, and form, as the use was limited. But if the issue in tail in that case waive the possession, and bring a formedon in the descender, and recover against the feoffees, he shall thereby be remitted to the estate tail, otherwise the lands may be so incumbered, as the issue in tail should be at a great inconvenience; but if no formedon be brought, if that issue dieth, his issue shall be remitted, because a state in fee-simple at the common law descendeth unto him." [*Taunton J.* It does

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does not appear by the case that *Thomas Allen*, the son, entered under the will of *Edward Allen* ?] There was no legal mode in which he could enter, but under that will; and unless the entry be by some right, no remitter takes place. The argument on the other side is, that a defeasible estate was thrown upon *Thomas* the son, which could only be by *Edward's* will, and that *Thomas*, having also the old estate in him, was then remitted back to that original right. [*Taunton J.* If the fine did not operate as a discontinuance, *T. A. Greenalgh* entered as remainder-man under the original settlement. *Patteson J.* In that case the recovery suffered by him was good, and *Thomas Allen* his son took only an estate for life under his will.]

DENMAN C. J. This is the case of a fine levied by a person who had become tenant in tail under a settlement made in 1708; unless, by reason of a term of years created by the same settlement, he is not to be so considered. If he was tenant in tail, he was competent to levy a fine; and if so, no argument or authority has been adduced to shew that that fine should not have all the ordinary legal consequences. We asked for such authority, but none was given: and, indeed, some of the cases which were cited for the defendants appear to establish the contrary doctrine; for where it is said that the possession of tenant for years is the possession of the party entitled to the freehold, that imports that such person is seised of the estate of freehold. The term of years, therefore, in this case, does not enter into the question, which is, not whether the tenant in tail was entitled to the corporeal possession of the land, but whether he was seised of a present estate of freehold.

The

The defendants, to support their view of the case, were certainly obliged to go the whole length of shewing that a party, to levy a valid fine, must be entitled to the actual possession of the land. No authority was cited to such an effect, and it is among the first elements of the doctrine of discontinuance, that tenant in tail may displace remainders by levying a fine. *Edward Allen*, then, being tenant in tail, did levy a fine, and displace the remainder limited to his brother; and no step was taken to set aside the tortious estate (as it is described) arising from the fine so levied. That estate was descendible, and capable of being devised: *Edward Allen* did devise it, and under that devise the lessor of the plaintiff claims. Then all the steps of the plaintiff's argument are complete: the estate in *Edward* was one of which a fine might be levied; it was levied, and by it the estate in remainder, which would otherwise have taken effect, has been discontinued, and no step has been taken to set the proceeding aside. Upon these short grounds, I am of opinion that the plaintiff is entitled to recover.

PARKE J. I am of the same opinion. The case turns upon two points, for the doctrine of remitter appears to me to be out of the question. First, as to the effect of the fine upon the estates in remainder. *Edward Allen* was tenant in tail in possession of the freehold, and no authority has been cited to shew that a fine by tenant in tail so possessed will not work a discontinuance. On the contrary, it is expressly laid down in *Co. Litt.* 332. b., that if tenant in tail make a lease for years, and afterwards levy a fine, "this is a discontinuance, for a fine is a feoffment of record, and the freehold passeth." For the

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the defendants, a passage in *Littleton*, sect. 618., was relied upon, where it is said that a fine of such things as might pass by grant will not operate as a discontinuance. But it is clear, on reference to the context, that *Littleton* is there speaking of such things as commons and advowsons; and not of reversions or remainders after an estate for years, which, according to Lord *Coke*, in the passage just now cited (332. *b.*) are subjects upon which a fine will work a discontinuance. And *Littleton* says, (s. 618.) “Of such things as pass by way of grant, such grant maketh no discontinuance, *as in the cases aforesaid.*” Then, what are the cases aforesaid? Where rents, advowsons, and commons are granted by deed. There being then no authority for the defendants on this point, and the uniform opinion in the profession, as far as I am informed, being, that in a case of this kind a term of years goes for nothing, the only question is, whether or not *Edward* was tenant in tail in possession of the freehold? That he clearly was, and the effect of his fine, therefore, was to displace all the remainders, and among them that of his brother, who, consequently, could not suffer a valid recovery. The second point is, what effect the fine had upon the estate of the conusor, *Edward Allen* himself? The effect was, to destroy the estate tail, and to give *Edward* a base fee; a fee determinable only upon a real action being brought by the subsequent party in remainder; besides which, the reversion in fee was in him. He had therefore a devisable interest; and I am, consequently, of opinion that the lessor of the plaintiff is entitled to recover.

TAUNTON

TAUNTON J. There is no rule better established than that a fine by tenant in tail works a discontinuance, and divests remainders and reversions and puts them to a right: but it was said here that the prior term of 500 years prevented the fine from having that operation. I asked several times if there was any authority for such a position. I can find none. On the other hand, several cases have been cited where it has been held that the possession of the termor is that of the person entitled to the next immediate estate of freehold. The rule to be collected from the books appears to me this, that no person can create a discontinuance without being, not in actual possession of the land, nor entitled to possession of it, but in actual possession of the estate tail by virtue of the entail; and in this case the party levying the fine was so. The only authority which at all supports the argument for the defendants is *Littleton*, sect. 618., and *Co. Litt.* 332. *a*, where it is said that of things which pass by grant, such grant works no discontinuance. The instances which *Littleton* puts (sect. 616, 617.) are rents, advowsons, and commons; and it is contended here that a remainder or reversion subject to a term of years may be conveyed by grant, and therefore that *Edward Allen's* interest lay in grant, and was not an estate in possession. I doubt the correctness of that proposition. The interest in a rent, common, or advowson might be passed by mere grant at common law, but not so a remainder or reversion subject to an estate for life or years: there the conveyance was not perfect without attornment by the tenant, and consequently such interests never lay simpliciter in grant, the assent of a third person being necessary. It is true, since 4 *Ann. c.* 16. s. 9., attornment is no longer necessary, but

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but for the present purpose the law must be considered as it stood in the times of *Littleton* and *Coke*. Here then was a discontinuance, by which the cognizor of the fine acquired a base fee; an estate determinable under certain circumstances, but nevertheless a fee; and being seised of such fee, he made the devise of it under which the lessor of the plaintiff claims. The only remaining question is, whether or not a person seised of a base fee can devise it like a fee simple, and of that I think there is no doubt. It was decided in *Jones v. Roe (a)*, that a possibility, coupled with an interest, was devisable. The subject matter there was an interest under an executory devise. A mere right of entry, indeed, was held not devisable, in *Goodright dem. Forster v. Forrester (b)*, but that is different from the case of a possibility coupled with an interest, which is assignable at common law during life, and therefore may be devised. A right of entry is not so assignable, and therefore not devisable. Most of the authorities on this point will be found in *Jones v. Roe (a)*. By the statute of wills, 32 H. 8. c. 1. s. 1., any person “having, or which hereafter shall have, any manors, lands, tenements, or hereditaments,” as there described, may devise the same; and a person having a base fee cannot be said not to have the lands, though his estate in them is defeasible. As to the question of remitter, it appears to me, for some of the reasons given by Mr. *Follett*, that the doctrine on that subject is not applicable to the present case. I am therefore of opinion that the plaintiff is entitled to recover.

(a) *Roe dem, Perry v. Jones*, 1 H. Bl. 30. S. C. in Error, 3 T. R. 88.

(b) 3 East, 552. 1 Taunt. 578. S. C. in Error.

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PATTESON J. On the subject of remitter, (assuming that the fine worked a discontinuance,) I think the answers given by Mr. *Follett* are correct. If *Thomas*, the son of *T. A. Greenalgh*, entered under his father's will, he adopted and was bound by his father's recovery, and took only an estate for life; if under the will of *Edward*, his uncle, he took under the statute of uses, and then the doctrine of remitter does not apply. It comes, therefore, to the mere question, whether or not the fine levied by *Edward* created a discontinuance. On that point the case is extremely plain. It is clearly laid down in the books, that any person who is tenant in tail in possession may levy a fine which shall discontinue remainders. What then is meant by the word possession? The fallacy of the argument for the defendants lies in the construction of that word. It does not mean that there is no term of years outstanding, but that the party is tenant in tail of the immediate estate of freehold, there being none prior, as distinguished from a tenant in tail in remainder where there is such prior estate of freehold. A distinction was attempted between terms created by the original settlor, and by the tenant in tail himself; and indeed the argument might otherwise be carried to the length of maintaining that a tenant in tail, by demising to a person who was to work the land for twenty-one years, was precluded from levying a fine during that time, to bar the remainder. But no passage has been cited in support of the distinction; no book alludes to it. Suppose a settlement limiting an estate for life to *A.*, remainder to *B.* for life, remainder in tail to *C.*, with a power of leasing, which power one of the tenants for life executes and dies, and the tenant in tail comes into possession; will the lease so granted under the power

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prevent the tenant in tail in possession from levying a fine? It is said that an estate tail, limited after an estate for years, is a remainder. I deny that as a general proposition. It is true, the passage cited from *Co. Litt.* 49 *a.* contains the word "remainder," and it is also true, that if an estate be granted to *A.* for years, and another estate to *B.* to commence when that determines, the latter estate is in some sense a remainder, because *B.* is not entitled to possession till the first estate determines, but still it is not a remainder in the sense in which that term applies to tenants in tail. Can any case be shewn where an estate for years was given to *A.*, with limitation over to *B.* for life or in fee, and *B.* was held not to take an immediate estate of freehold? In *Berrington v. Parkhurst* (*a*), an estate was limited to *A.* for ninety-nine years, if he should so long live, and from and after his decease, or other sooner determination of the term, to trustees during the life of *A.* to support contingent remainders; remainder to the first and every other son of *A.* *A.* and his son levied a fine and suffered a recovery, without the concurrence of the trustees, and it was held void, because the trustees had an immediate estate of freehold, and not merely a contingent interest, in which case the decision would have been different. I can find no authority for saying, that a term of years will preclude a man who has the immediate tenancy in tail, the immediate interest in the freehold, from levying a fine; and if not, the effect of the fine must be the same as if there were no term. It is said that there can be no tortious alienation during the lawful possession of the termor: and it may be true, that no such tortious

(a) 13 *East*, 469.

alienation can take place so as to destroy the term. The question discussed in the cases on that subject has been, whether or not the term was destroyed. But if the fine was void altogether where a term existed, that question could never have arisen. It appears to me, then, that the term of years in this case is out of the question, as far as regards the operation of the fine: that the fine, levied by a tenant in tail in possession of the immediate interest in the freehold, worked a discontinuance, and he acquired a tortious fee; and, consequently, that under his will the lessor of the plaintiff has a valid title.

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Judgment for the plaintiff (a).

(a) See the statute 3 & 4 W. 4. c. 74., "for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance."

The KING *against* OAKLEY and Others.

Thursday,
Nov. 22d.

THE defendants were brought into Court upon a writ of habeas corpus, by the return to which, it appeared they were detained in custody under a conviction, which stated that *Edward Penfold* complained to three justices therein named, that *R. Oakley, W. T., J. R., G. H., and W. F.*, into and upon the mansion-house of him, *Penfold*, called *Heath House*, and divers outhouses to the same mansion-house belonging, situate,

The stat. 3. & 4. W. 4. c. 74. 15 Ric. 2. c. 2. gave justices a summary jurisdiction to convict on their own view, for a forcible detainer after a forcible entry.

The stat. 8 Hen. 6. c. 9. recites that the stat. 15 Ric. 2.

c. 2. does not extend to entries in tenements in peaceable manner and after holden with force, and then enacts, that that statute shall be duly executed, and if from thenceforth any doth make any forcible entry in lands, &c. or them do hold forcibly after complaint thereof made within the same county where such entry is made, to the justices of peace, they shall cause the statute duly to be executed:

Held, that the statute of 8 Hen. 6. was intended to give a summary jurisdiction in cases of forcible detainer after an *unlawful* entry; and that a conviction by justices on that statute, merely stating an entry and a forcible detainer, was insufficient.

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&c.; and also into and upon divers closes, pieces or parcels of land, to wit, &c. of him, *Penfold*, situate, &c., then lately *did enter*, whereof *Penfold* was tenant by copy of court roll for the term of his natural life, and the same mansion-house, outhouses, closes, pieces or parcels of land from him, *Penfold*, unlawfully with strong hand and armed power *did hold, and from him detain*, against the form of the statute; whereupon *Penfold*, to wit, on, &c. at, &c. prayed of them so as aforesaid being justices, &c. that a due remedy should be provided to him in that behalf according to the statute; which complaint and prayer by them, the said justices, being heard, the said justices to the mansion-house, outhouses, and closes aforesaid, personally came, and did find and see the aforesaid *R. Oakley, W. T., J. R., G. H., and W. F.*, the aforesaid mansion-house, outhouses and closes, with force and arms, *unlawfully* with strong hand and armed power *detaining* against the form of the statute, and according as he, *Penfold*, so as aforesaid, had unto them complained; therefore it was considered by them, the aforesaid justices, that the aforesaid *R. O., W. T., J. R., G. H., and W. F.*, of the *detaining* aforesaid by strong hand, by their (the justices') own proper view had, were convicted, and every of them was convicted according to the form of the statute, &c. The conviction then stated that a fine of 50*l.* was imposed on each of the defendants, and they were committed to *Bedford* gaol until they paid their fines.

Adolphus now moved that the defendants should be discharged. The conviction is insufficient, being for a forcible detainer only, and not stating any wrongful or forcible entry. The justices have proceeded on their
own

own view on the stat. 15 *Ric.* 2. c. 2., but that statute applies to such forcible detainers only as are preceded by forcible entries. [*Lloyd*, *contra*, here intimated that he should rely upon the stat. 8 *H.* 6. c. 9.] That act recites the statute 15 *Ric.* 2. c. 2., and that owing to certain defects therein, many wrongful and forcible entries be daily made into lands by such as have no right, and ordains “that it, and all other statutes of such entries, shall be duly executed,” with an additional enactment, “that from henceforth where any doth make any forcible entry in lands and tenements, or them hold forcibly after complaint thereof made within the same county where *such* entry is made, then the justices shall cause the said statute duly to be executed.” That statute, therefore, applies to a case where the holding forcibly is preceded by a forcible and wrongful entry. At least the entry should appear to have been unlawful. Besides, the magistrates upon the statute of 8 *Hen.* 6., cannot proceed upon their own view, but are to make a precept to the sheriff commanding him to return a jury.

Lloyd contra. Forcible entries upon lands and forcible detainers of land have been made offences by several statutes (*a*). The stat. 15 *Ric.* 2. c. 2. first gave magistrates a summary jurisdiction in case of forcible entries. It enacts, that in case of such forcible entries and complaint thereof, as there mentioned, the justices are to take sufficient power of the county and go to the place where such force is made, “and if they find any that hold such place forcibly *after* such entry made, they shall be taken and put in the next gaol there to abide,”

(*a*) See *Hawk. P. C.* b. 1. c. 64. *Dallou's Justice*, c. 44. 125.

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&c. To bring a case within that statute, undoubtedly the forcible detainer must have been preceded by a forcible entry. It did not provide any remedy for cases where the entry had been *peaceable*, and the land afterwards detained by force; nor where, the entry having been forcible, the parties who made it had quitted the land before the magistrates arrived. To remedy this inconvenience the 8 *Hen. 6. c. 9.* was passed. It recites that the statute 15 *Ric. 2.* did not extend to entries into tenements in a peaceable manner, and after holden with force, and then declares that the said statute shall be duly executed, adding thereto, "that from henceforth where any doth make any forcible entry in lands or tenements, or them hold forcibly after complaint to the justices of peace, the justices shall cause the statute duly to be executed." Section 3. gives the justices power to enquire by a jury concerning such forcible entries and detainers, and, if it be found that any doth contrary to this statute, to reseize the lands so entered or holden, and to put the party in full possession. Section 7. enacts, that the statute shall not endamage any person where he or his ancestors, &c. have continued in possession for three years. The stat. 8 *Hen. 6. c. 9.*, construed together with the 15 *Ric. 2. c. 2.*, which it recites, therefore authorized two modes of proceeding: one by the justices on their own view, the other by summoning a jury to enquire into the forcible entry or detainer. Here, they have proceeded upon their own view. [*Patteson J.* Nothing is stated on the face of the conviction to shew that the entry of the defendants was not lawful.] The stat. 8 *Hen. 6. c. 9.* makes a forcible detainer after a *peaceable* entry an offence. [*Taunton J.* The entry may be peaceable, yet wrongful.] If the statute applies only to forcible detainers after an unlawful entry, the case of
a tenant

a tenant at will or for years holding over after the respective interests have expired, will not be within it. Yet such cases are within the mischief.

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DENMAN C. J. I am of opinion that this conviction cannot be sustained, the facts set out in it not being sufficient to give the magistrates jurisdiction. There is a material distinction between a forcible entry and a forcible detainer. The stat. 15 Ric. 2. c. 2. makes a forcible entry in all cases an offence cognizable by justices in a summary way, but a forcible detainer only when it is preceded by a forcible entry. The stat. 8 H. 6. c. 9. makes a forcible detainer an offence so cognizable by justices, even where it is preceded by a peaceable entry. It seems to me, that the entry there spoken of must be unlawful, or, at all events it must be shewn, that the forcible detainer there spoken of was unlawful. Now, for any thing that appears on this conviction, the original entry by *Penfold* may have been both peaceable and lawful, and his subsequent possession and detainer rightful, and I cannot think that the legislature meant that the act of a man in maintaining his own rightful possession with force against a wrong-doer should authorize the justices to turn him out of possession. Assuming, therefore, as we may in this case, that the original entry by *Penfold* was peaceable and lawful, the subsequent detainer ought to have been shewn, by facts disclosed on the face of this conviction, to be unlawful. Here, no such facts are stated. It is not sufficient for the justices to state that they found the detainer unlawful; they ought to have stated facts which made it so. There being no such statement, the conviction is bad, and the defendants are entitled to be discharged.

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PARKE J. The question has been reduced to two points: first, whether a party can be convicted of a forcible detainer on view of the justices; and, secondly, whether there should be, on the face of the conviction, an allegation that the entry on the land by the defendant was unlawful. The case arises on the statute 8 *Hen. 6. c. 9.* I think that statute clearly gives the justices a summary jurisdiction in cases of forcible detainer. When complaint is made to the justices, the party charged may traverse any fact stated in the information, *Regina v. Layton (a)*. If he does not choose to traverse, the facts alleged in the complaint must be taken as admitted. Then as to the objection, that the conviction does not state the original entry to have been unlawful, I incline to think that the statute 8 *Hen. 6. c. 9.* does not apply to cases where the original entry is lawful, and considering the charge is of a criminal nature, I think it should have been stated on the face of the conviction that the entry was unlawful. I should have wished to take time to consider on that point, had not my Brothers entertained a clear opinion upon it. It will not follow from our decision, that the statute 8 *Hen. 6. c. 9.* does not apply to the case of a tenant at will or for years, holding over after the will is determined or term expired, because the continuance in possession afterwards may amount in judgment of law to a new entry. *Hawk. P. C. b. 1. c. 64. s. 34.*

TAUNTON J. I am of opinion that the conviction is insufficient. This is a highly penal statute, and ought not to be extended by loose and uncertain construction.

(a) 1 *Salk.* 353.

In order to bring a case within the summary jurisdiction of the magistrates, every thing necessary to constitute the offence must be clearly and positively stated. The statute 8 *Hen.* 6. c. 9., after reciting the 15 *Ric.* 2. c. 2., declares “that that statute doth not extend to entries in tenements in a peaceable manner, and after holden with force.” A forcible detainer after a peaceable entry was therefore not a case within the statute 15 *Ric.* 2. c. 2. The stat. 8 *Hen.* 6. c. 9. then enacts, “that from henceforth where any doth make any forcible entry in lands, &c. or them hold forcibly after complaint thereof made within the same county where such entry is made, to the justices of peace by the party grieved, the justices shall cause the said statute (of 15 *Ric.* 2.) to be duly executed.” It has been argued that any forcible holding is sufficient to authorize the justices to convict. It seems to me that every forcible holding (though such holding may under some circumstances be the ground of an indictment at common law) is not within the statute, but that it applies only to a forcible detainer preceded by an unlawful entry. The principal alteration introduced by the statute 8 *Hen.* 6. c. 9. was, to make a forcible detainer after a *peaceable* entry an offence. A party may, however, enter peaceably, but unlawfully; it by no means follows that, because he may have entered peaceably, he had any lawful right to enter. It should, then, have appeared by the conviction that the entry was unlawful, and it has been usual in cases under this statute so to state it.

PATTESON J. This conviction cannot be supported. The stat. 15 *Ric.* 2. c. 2. gave magistrates a summary jurisdiction in all cases of forcible entry; but in cases
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of forcible detainer, only where there had been a previous forcible entry, and there may have been good reason for not making every forcible detainer an offence cognizable by justices in a summary way, for it would be hard to allow a man to be turned out of possession for detaining with force that land to which he is rightfully entitled. But notwithstanding that statute, a party who had acquired the possession of lands peaceably, though unlawfully, might afterwards detain them forcibly. That was a mischief which the stat. 8 *Hen. 6. c. 9.* was intended to remedy. Now there is no statement in this conviction that the entry was unlawful. In *Rex v. Elwell (a)*, where the defendants were convicted before justices, on their view, of an unlawful detainer, it was stated in the information that they unlawfully ejected, expelled, and amoved the complainant, and the messuage unlawfully withheld, and that precedent is adopted in *Burn's Justice (b)*. There are no words in the conviction here to satisfy me there was any unlawful entry. I cannot entertain a doubt that one of the remedies intended to be given by that statute, was, to extend the summary jurisdiction of magistrates to cases of forcible detainer preceded by a peaceable but an unlawful entry. If it were not confined to such cases, the consequence would be, that a person who had had two years' rightful possession of land, might be liable, under any circumstances, to be fined and imprisoned for forcibly maintaining that possession against a wrongdoer.

The party was discharged out of custody.

(a) 2 *Ld. Raym.* 1514. 3 *Ld. Raym.* 360.

(b) Vol. ii. title *Forcible Entry*.

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CLARKE *against* The IMPERIAL Gas Light and
Coke Company.

Saturday,
Nov. 24th.

COVENANT for arrears of an annuity alleged to be payable to the plaintiff by virtue of an indenture under the common seal of the defendants. The indenture was set out on oyer. It recited that the company had been incorporated and established for lighting certain parts of the metropolis with gas, by certain statutes (1 & 2 G. 4. c. cxvii. and 4 G. 4. c. xcv., both public); that the plaintiff had been their clerk at a salary of 700*l.* a year, and had conducted himself diligently and faithfully in that employment, but had lately been incapacitated by ill health: that a committee of proprietors, duly appointed by a general meeting of the company, had reported to a special general meeting that in consequence of the plaintiff's state of health,

By statute 6 & 7 G. 4. c. 33
1 & 2 G. 4. c. 38, 17 & 18 G. 4. c. cxvii. incorporating a gas light company, it was enacted, that the directors should have the custody of the common seal, and power to use it for the affairs and concerns of the company, who were themselves by another clause empowered to make orders under seal at their meetings, for the government of the company, and for regulating

the proceedings of the directors. No power was expressly given by the act to grant annuities. At a special general meeting of the company, a committee, previously appointed for certain purposes, reported that it was expedient that the then clerk, whose health was bad, should be invited to retire upon a pension, on condition of abstaining from acts prejudicial to the company; that such proposal had been made to him, and that he had accepted it. The meeting voted that the report should be received and entered on the minutes, and that the directors should carry into effect the committee's recommendation. No order to this effect was made under seal. The directors, by deed in the name of the company, granted an annuity to the clerk on his retirement, subject to conditions of the nature above stated, and they put the corporate seal to it: Held, that the seal was properly affixed by the directors; that the granting of such annuity was warranted by the statute; that it was a concern of the company, within the first-mentioned clause; and that no order of the company under seal was necessary to authorize it.

The act prescribed that nothing should be done at any special general meeting, but the business for which it was called; and certain forms were required for calling it. On a special case stated, which set out entries of the proceedings whereby the grant was authorized, it did not appear that those forms had been gone through, and the company, who were sued on the above deed, alleged this irregularity in answer: Held, that it lay on them to give strict proof of the default; and this not being done, but a possibility appearing that the forms might have been complied with, the Court would not presume the contrary.

By the statute, the orders and proceedings entered in the company's books were to be considered as originals, and read in all courts, &c. *Quære*, Whether this rendered them admissible evidence as between the company and a stranger?

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it appeared expedient to invite him to retire on a pension of 400*l.* a year, on the usual condition of abstaining from acts to the prejudice of the company; that such proposal had been made to and assented to by him; and that (for reasons which the committee assigned) it was likely to prove but a small burden to the company: the indenture further recited that the report was approved by the meeting, and referred to the directors to be carried into execution; and that, the said report and proceedings having been communicated to the plaintiff, he, in consideration of the said pension, had resigned his office. And it was then witnessed, that in consideration of his past services, and of his resignation in compliance with the said report and proceedings, and in consideration of 5*s.* paid, &c. the said company in pursuance of the recommendation of the committee in their report, and of the resolution made thereon by such general meeting as aforesaid, and in exercise of any powers or authorities to them given or in them vested by the aforesaid acts of parliament, or either of them, and of every other power and authority in anywise enabling them in this behalf, did grant to the plaintiff, his executors, &c. one pension, annuity, or clear annual sum of 400*l.*, payable out of and charged upon all and singular the stock, funds, estate, and effects of the company, and the gains and profits thereof, to have, hold, &c. from the date of the said indenture (when he resigned his office as aforesaid), for the term of his natural life; and there was a covenant by the company for payment of the said annuity in the manner and at the times in the indenture specified; upon condition, nevertheless, that the said annuity should be forfeited, if the plaintiff should (except by leave of the company) manufacture
or

or supply, or become an officer of, or connected with, any other company who should manufacture or supply, or undertake to manufacture or supply, gas for lighting within the parts and district which the first-mentioned company were then entitled to supply and light with gas. The defendants pleaded non est factum. At the trial before Lord *Tenterden* C. J., at the sittings in *London* after *Michaelmas* term 1831, a verdict was taken for the plaintiff for 400*l.*, subject to the opinion of this Court upon the following case: —

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The indenture was produced by the plaintiff, and was proved to be under the corporate seal. The evidence given by the defendants was as follows: — A general meeting of proprietors, duly convened, was held on the 8th of *March* 1827, and was attended by many, but not all, of the proprietors. The proceedings, as after stated, are entered in the books of the company, and the entries are correct statements of the business transacted at such meeting. The first entry is, “Resolved, that a committee be appointed to investigate and examine the accounts of the company from its formation to the present period, (any three of whom shall form a quorum), and that such committee shall have the power to call for the production of, or to inspect, all books, documents, &c. in the custody or power of the directors, and of every officer of the company, and to report.” By the second resolution, the directors and other parties were requested and authorized to give information to the committee. By the third, the committee were requested to make up a debtor and creditor account, and a balance sheet containing a full statement of the company’s affairs, &c. By the fourth and fifth the committee were empowered to employ an accountant, and to make amend-
ments

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ments in the books, &c. The sixth is as follows:—

“ Resolved, that the said committee be requested and empowered to examine into and consider the duties of the several officers of the company in all or any of their several departments, together with the salaries attached to their offices, and to report thereon at the next general meeting of the proprietors.” Much other business is entered in the books as transacted at the same meeting, but it is not material to the present case.

On the 23d of *July* 1827, the plaintiff (then being clerk) sent a circular to the proprietors, giving notice of a special general meeting to be held on the 3d of *August*, “ to receive the report of the committee appointed to examine into the accounts and concerns of the company at the general meeting held on the 8th day of *March* last, and to adopt such measures thereon as the said meeting shall deem expedient.” Advertisements to the same effect were published in the newspapers, as required by statute. The meeting was held accordingly; some, but not all, of the proprietors attended. The proceedings are entered in the company’s books, which state that, the advertisements and circular calling the meeting having been read, the report of the committee appointed on the 8th of *March* was also presented and read, and a resolution passed, that the same should be received and entered on the minutes, and the directors instructed to take steps for carrying into effect the recommendations therein contained. The report contained, among other things, that statement respecting the company’s clerk, the present plaintiff, which is, in substance, recited in the indenture, as set out above. On the 19th of *September* 1827, a special general meeting was held in pursuance of a circular letter and advertisements duly
issued,

issued, in which the proprietors were requested to meet “for the purpose of electing a fit and proper person to be clerk of the company, in the place of Mr. *Henry Clarke* (the plaintiff) who has resigned.” Some (but not all) of the proprietors attended. The entry of the proceedings in the company’s books is, that, after the notice of meeting had been read, the following report of the directors was presented and read: — “Your directors, in conformity with the resolution passed at a general meeting of the proprietors held on the 3d of *August* last, proceeded to carry into effect the order for granting an annuity of 400*l.* to Mr. *Henry Clarke*, who has acceded to the terms proposed, and in consequence resigned the situation of clerk to this company.” Then follow other entries of business done at the meeting, but not material to this case.

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The indenture was, before the commencement of the action, assigned to a proprietor of the company, who, in that capacity, attended the aforesaid meetings. No proof was given of the time or manner of affixing the corporate seal, nor, except so far as is above stated, of any authority or direction given to any person to affix the same. None of the entries above mentioned is under the corporate seal. The questions for the opinion of the Court were, first, whether the above evidence for the defendants was receivable; and, secondly, if it were, whether it constituted a defence to the action by shewing the deed to be void. This case was argued on a former day of the term.

Platt for the plaintiff. The books were not evidence for the company, being mere documents of their own, to which the plaintiff, as regards this action, is a stranger. The company, being incorporated, has a certain common

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mon seal, which, when once affixed to a deed, is evidence of their being parties to it: whether proper steps were taken to authorize the affixing of it or not, may be matter of dispute among themselves, but cannot affect the right of a third party. Their books are nothing more than the memorandum of a private person, and can have no greater effect to invalidate their own deed. The instrument itself is regular on the face of it, it grants what the company might grant, and for purposes which are legitimate, and beneficial to them.

R. V. Richards contra. The evidence was receivable, as tending to avoid the deed. In the case of a deed executed by an individual, the plaintiff proves the execution and delivery: in the instance of a corporation, the seal is *primâ facie* evidence of regular execution; but in the latter case it may be proved that the seal was affixed without proper authority, and the deed therefore invalid; just as, where an individual pleads *non est factum*, whatever shews that he was at the time incapable of binding himself by deed is evidence to support the plea. Formerly the special matter would have been pleaded with the conclusion, “*et sic non est factum* ;” but that is no longer customary. A defendant may prove, under the general plea of *non est factum*, that a bail-bond was executed by him after the return of the writ, *Thompson v. Rock* (a); or that a bond was delivered as an escrow, *Stoytes v. Pearson* (b). It is the same with a corporation; and, “If a person pretending to be mayor of a corporation, put the corporation seal to a deed, yet it is not, by that, the deed of the corporation.” *Anonymous*, 12 *Mod.* 423. In the *Derby Canal Company v. Wilmot* (c), an incor-

(a) 4 *M. & S.* 338.(b) 1 *Esp. N. P. C.* 255.(c) 9 *East*, 560.

porated

porated company sold land, and directed their clerk to seal a conveyance, which they placed in his hands, but not to part with it till certain accounts were adjusted; and it was held that the sealing, under these circumstances, did not pass the estate. The circumstances, therefore, under which a corporation seal was affixed, may be enquired into: and here it may be shewn that that act was done without proper authority. The company's books are evidence on that point; for, by 1 & 2 G. 4. c. cxvii. s. 60., (which incorporates the company) the orders and proceedings entered and signed as there specified, "shall be deemed and taken to be original orders and proceedings, and shall be allowed to be read in all courts and places whatsoever, and by and before all judges, justices, and others." [*Taunton J.* They must be evidence for some purposes; the question is, whether they are so for this.] The business referred to a committee by the resolutions of *March 8th*, 1827, was not such as the meeting of proprietors could lawfully delegate; but assuming that they could, the committee were not authorized to report upon a matter not referred to them, namely, the granting a pension to the clerk upon his resigning his office: nor was the meeting of the 3d of *August* empowered to take that subject into consideration; for, by 1 & 2 G. 4. c. cxvii. s. 61., no business is to be transacted at any special general meeting besides that for which it shall have been called; and the notices of the 23d of *July* say nothing of a proposed grant of an annuity. By sect. 62. of the last-mentioned act, dividends are to be made half-yearly out of the clear profits, subject to certain regulations; one of which is, "that no dividend shall be made whereby the capital of the company shall be impaired."

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To grant an annuity like the present, is contrary to the policy of this section, which is, that the funds of the year shall pay the year's expenses; and such a grant does tend to impair the capital. The company might as well pay the current expense of coals by annuities charged on the future funds; or give their servants reduced allowances, securing to them annuities for life on their dismissal. Sect. 71. gives power to the directors to use the common seal "for the affairs and concerns of the company," but that is only for the ordinary affairs. In a matter like the present, they could only be authorized to use it by an order or by-law; and by sect. 76., any by-law made at a general, or special general meeting "for the good government of the company, and for regulating the proceedings of the directors," must be under the common seal. In *Dunston v. The Imperial Gas Light Company* (a), the majority of the Court seem to have been of opinion, that a resolution for giving remuneration to a director, which is not provided for by the statute 1 & 2 G. 4. c. cxvii., ought to have been made in the form of an order under seal. There is no provision in the act for remunerating the clerk. It does not any where appear to have been intended by the act, that the company should grant annuities, and they cannot take upon themselves to act as a corporation for other purposes than those for which they were incorporated. This was one argument adverted to by the Court in *Broughton v. The Manchester Water-works Company* (b), where it was held, that that corporation could not accept bills payable at less than six months. In that case it was observed, that if such acceptances could be given, the corporation might be-

(a) 3 B. & Ad. 125.

(b) 3 B. & A. 1.

come a banking company : and so, if the present deed were held available, this gas company might become a society for granting annuities.

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Platt in reply. It may be admitted that, on *non est factum*, evidence is receivable to shew that the supposed deed is no deed at all; as in the case of infancy, or coverture, or an instrument delivered as an escrow. But here, even supposing the books to be evidence, (which has not been established,) it does not result from the proceedings that, owing to any irregularity, the indenture in question was no deed. (He then referred to the several entries set out in the case.) But the clause that the books shall be evidence, is only one of the terms of the partnership; they might be evidence as between the partners, but yet not against strangers. By 1 & 2 G. 4. c. cxvii. s. 71., the directors have the custody of the common seal, to be used for the affairs and concerns of the company; and it appears from the case that they did affix it in the present transaction, which clearly was an affair and concern of the company. No fraud is imputed. The seal being in the hands of the directors for these purposes, it is absurd to require an order under seal to them; for they must also seal that. *Dunston v. The Imperial Gas Light Company*(a) only decided that the instrument there in question, which was an order for giving a remuneration to directors, ought to have been under seal to bind the company. It is within the scope of the act that servants of the company should be remunerated; and this Court is not called upon to lay down restrictions as to the

(a) 3 B. & Ad. 125.

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mode of payment. The annuity is not properly a charge upon future funds, the whole interest being in the present members: but if the charge were such, the proper redress would be by application to a court of equity. This is not a taking up of money on annuity by way of loan, which would be contrary to sect. 31., but an actual repayment of past services. Sect. 62. only regards an improper distribution of supposed profits. If the current expenses of the company exceeded the income, the capital must be touched. *Broughton v. The Manchester Water-works Company* (a) was the case of a corporation not established for trading purposes assuming the power to accept bills, which is very different from executing a deed.

Cur. adv. vult.

DENMAN C. J. now delivered the judgment of the Court. The question in this case turned upon the validity of a bond granted by the company to Mr. *Clarke*, who had been in their service, and which was in the nature of a retiring pension. It was contended in the first place that this bond was void, as not having been executed conformably to the act of parliament by which the company was constituted, and the case was put, on behalf of the defendants, of a corporation seal having been affixed to a deed by one who had assumed the office of mayor. But here the seal was undoubtedly applied by those who had the legal custody of it, that is, the directors of the company.

It was further urged, that the bond was granted for a purpose not warranted by the act, and in this respect

(a) 3 B. & A. 1.

Broughton

Broughton v. The Manchester Water-works Company (a) was supposed to apply. Mr. Justice *Holroyd* there observed, that a bill of exchange could not bind the company, who could only contract under seal, and this the defendant must be supposed to know; and it was said by another learned Judge, that if a company, established for purposes however limited, could accept bills, it might erect itself into a banking company. So it was argued here by the defendant's counsel, that this, which is a company for supplying *London* with gas, would be converted into a company for granting annuities, if a bond of this kind were to be sustained. We are, however, of opinion that the general authority confided to the directors to manage the concerns of the company may well authorize a grant like this, particularly to an officer entitled to a salary, wishing to retire on account of ill health, and agreeing to abstain from transferring his services to any other company.

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A third objection was, that no such contract could be made without the consent of the general body of proprietors, called together by notice for this particular object. The act does require this, and if we could distinctly see that the forms prescribed by the act in this respect had not been complied with, the argument would have great weight. But, on the contrary, if we were to enquire into the facts, we might perhaps find that the forms of the act had been strictly complied with. It is enough to observe, that proof of this irregularity does not appear in plain terms upon the case, and the company, when they seek to set aside their own formal act on the ground of irregularity in the preliminary proceed-

(a) 3 B. & A. 1.

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ings, ought to make out such a defence by the most cogent proof. Although the case sets out the proceedings impeached as irregular, it is not asserted that other proceedings might not have taken place, in which all the requisite forms were complied with. For any thing that appears in the case, it is possible that due notice may have been given for considering whether the proposal made by the committee on the 3d of *August* should not be carried into effect; the general meeting of proprietors may have concurred in the steps taken by the directors for executing it; and if this was regularly done before affixing the seal to the instrument, all was right: and then, inasmuch as the seal was set by those who had the power of affixing it, and to an instrument giving effect to a bargain which the company had power to make, as no fraud is imputed to the plaintiff, and there is a possibility, upon the facts set forth, that the apparent irregularity may not have occurred, we think the plaintiff is entitled to judgment. As our opinion proceeds upon the supposition that the facts set forth in the company's books are true, the question, whether or not they were admissible on their behalf, does not arise.

Postea to the plaintiff.

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The KING *against* The HUNGERFORD Market
Company.

Saturday,
Nov. 24th.

(Ex parte ELIZABETH DAVIES.)

A RULE nisi had been obtained for a mandamus to the company to issue their warrant (pursuant to the statute 11 G. 4. c. lxx.) for summoning a jury to assess damages and compensation to *Elizabeth Davies* for her interest in the *Ship* public-house. The affidavits in support of the rule stated, that the said *E. Davies* was possessed of the premises in question, under a lease for twenty-four years from *September* 1822, and that, after some correspondence respecting a proposed purchase of them by the company, (in which the parties did not agree as to the steps to be taken with respect to a valuation,) she received from their clerk a notice (stated to be given in pursuance of sect. 6. of the above-mentioned act) to the following effect: — “That the messuage or tenement called,” &c. (describing it) “and mentioned and contained in the schedule to the said act, is required for the purposes of the said act, and that it is the intention of the company of proprietors duly constituted by the said act, to contract for the purchase of all subsisting leases, terms, estates, and interests therein, and that in case you shall not within the space of

By stat. 11 G. 4. c. lxx., the *Hungerford Market Company* were empowered to purchase certain premises for the purposes of the act, and by sect. 6. it was enacted as follows: — That if any person interested in such premises shall, for twenty-one days next after notice given him of their being required for the purposes of the act, refuse to treat, or not agree, for the sale thereof, in every such case the company shall cause the value of, and recompense to be made for, such premises to be enquired of by a jury; and for summoning and returning such

jury they are empowered to issue their warrant to the High Bailiff of *Westminster*, who is required to impanel, summon, and return such jury, and is empowered to swear twelve, and to examine witnesses before them, &c.; and they shall assess the damages and recompense. &c. :

Held, that the company, having given such notice to an occupier, could not withdraw from it, though they offered to pay all reasonable costs incurred by him in consequence; but that the act obliged them, on his demand, to issue their warrant to the High Bailiff for summoning a jury. And the Court granted a mandamus to compel them so to do.

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twenty-one days from the date hereof, treat, contract, and agree with the said company for the sale of the said premises, and all subsisting leases, &c. therein, it is the intention of the said company forthwith after the expiration of twenty-one days, to issue their precept to the high bailiff of the city and liberty of *Westminster* to summon and impanel a jury for the purpose of enquiring into and assessing the damages and recompense to be given for and in respect of the said premises, and all interests therein, according to the provisions of the said act. Dated this 25th day of *February* 1832." A similar notice was given to Mrs. *Drake*, the owner of the freehold. It was further stated, that in the expectation that these notices would be acted upon, Mrs. *Davies* reduced the stock upon her premises, and had ever since the notice been ready and willing to give up possession to the company, on receiving a reasonable compensation; and that the premises had been surveyed and valued on her behalf, and preparations made to support her claim before a jury: that a request being made on her behalf on the 17th of *April*, by S. T. *Bull*, her surveyor, to know when the case would be submitted to a jury, the company's clerk, on the 2d of *May*, returned the following answer:—"Sir, —I am desired by the court of directors to acknowledge the receipt of your letter of the 17th of *April*, and to remind you that you have been informed that the premises of Mrs. *Davies* are not wanted. I am, Sir, &c." It was further alleged, that the premises had been much lessened in value by the company's works. On behalf of the company it was stated, that on the 3d of *April* their attorney conferred with the attorney of Mrs. *Drake*, and not being able to agree with him upon terms, declined the premises, and paid his

his bill of costs; that he informed Mr. *S. T. Bull* of this shortly after the 3d of *April*; and that he was not apprised, till the 6th of *June* following, that the attorney for Mrs. *Drake* did not also act for Mrs. *Davies*: that on the said 6th of *June*, *H. W. Bull*, as attorney for Mrs. *Davies*, gave him notice, that he, *Bull*, would attend the court of the company on the following day, to know what course they meant to pursue: that *H. W. Bull* accordingly had an interview with the company on the 7th, and that on the 8th, the deponent, the company's attorney, by their direction, wrote to him as follows: — “ Sir, — I am desired by the board of directors to inform you, that as the sum asked for the purchase of the freehold of the *Ship* public-house, and Mrs. *Davies's* interest therein, so greatly exceeds the sum the company had reason to expect, they declined the purchase altogether, of which your client was informed on the 3d of *April* last. The company however are willing, and I hereby offer on their behalf, to pay any necessary and reasonable expense your client may have incurred in consequence of the notice of the 25th of *February* last.”

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Sir *James Scarlett* now shewed cause. Under the circumstances disclosed by the affidavits, the company were not bound to take these premises. (He then commented upon the facts sworn to, and the correspondence.) The sixth section of the act (*a*) enables the
company,

(*a*) By which it is enacted, that if any person interested in, or having or claiming power to sell, the messuages, &c. in the first schedule to the act described, or any part thereof, shall, for the space of twenty-one days next after notice in writing, signed by the clerk of the company, shall have been given to him (as is there specified) of such messuages, &c. being required for the purposes of the act, neglect or refuse to treat and
agree,

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company, if the owners of messuages, &c., after twenty-one days' notice, will not treat with them for the sale of such premises, to have a jury summoned, who shall assess the compensation: but the clause is not so worded as to be at all events compulsory on the company. Although they may have given notice, there is a locus poenitentiae, and here it is not unreasonable that the company should claim it. Their notice was given on the 25th of *February*; the written answer of their clerk to Mrs. *Davies's* surveyor was sent in the beginning of *May*; and they have offered to pay all reasonable expenses incurred by Mrs. *Davies* in consequence of the notice.

agree, or shall not agree, for the sale of the said premises, or shall be prevented by absence or disability, or cannot be found or known, or shall not produce a clear title, "then and in every such case the said company or their successors *shall cause the value and recompence to be made for such messuages, wharfs, lands, or hereditaments, to be inquired into and ascertained by a jury* of twelve indifferent men of the said city of *Westminster*; and for the summoning and returning such jury the said company and their successors are hereby empowered from time to time to issue a warrant under their common seal to the High Bailiff of the said city and liberty of *Westminster*, or his deputy, thereby commanding and requiring him to impanel, summon, and return an indifferent jury of twenty-four persons," &c.; and the High Bailiff is required to impanel, summon, and return such number, out of whom he is empowered to swear twelve to be the jury for the purposes aforesaid, &c.; he is further empowered and required to summon witnesses, and examine them on oath before the said jury; and he shall cause the jury to view the places in question if necessary, and use all lawful ways and means for his own and the jury's information, as he shall think fit; "and the said jury shall assess the damages and recompence to be given for the messuages, &c. to the respective owner or owners and occupier or occupiers thereof, according to his, her, or their respective interests therein, and shall give in their verdict thereupon;" and after such enquiry and verdict the High Bailiff "shall thereupon order, adjudge, and determine the sum or sums of money so assessed by the said jury to be paid for the said messuages, wharfs, lands, or hereditaments, or any interest therein, according to such verdict or inquisition of the said jury."

Kelly

Kelly and Channell contra. The notice binds the company as well as the individual, otherwise great injustice would be done. The first sections of the act give particular facilities to the company in treating for, and taking conveyances of, certain premises which are described in a schedule: and until the expiration of three years from the 29th of *September* 1830, (sect. 4.) they may compel the owners of such premises to sell them; for by sect. 6. they may, without any other treaty, at once give notice to the occupiers of such premises that the same are required for the purposes of the act, and if the parties do not, within twenty-one days after such notice, agree with the company upon terms of sale, a warrant is to issue for summoning a jury to assess compensation, whose verdict, by sect. 7., is to be final. Every thing here, as respects the tenant, is done *in invitum*. It is at the option of the company to give notice or not. In the present case notice is given: the tenant begins selling off his stock, employs a surveyor, and incurs other expenses: and it is now said, that after this has taken place, the company may turn round and renounce the premises. The Court would not hold that the legislature had intended to give such a power, unless the words of the act were too strong to leave a doubt. But here the language is imperative; that if an agreement be not come to after notice, “in every such case the company *shall* cause the value and recompense to be enquired into and ascertained by a jury.” Under this act the company obtain the whole benefit of a contract for the sale and purchase of the premises (on terms to be afterwards ascertained), by merely giving notice to the owner and occupier. Can it be said that they shall also be at liberty to withdraw from such contract at their

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their own pleasure? And if so, may not this be done at any time before the jury have given their verdict, or even before the high bailiff has made his adjudication in pursuance of it? If the notice has the effect of a contract, it can only be rescinded by both parties.

DENMAN C.J. The parties forming the company have obtained an act of parliament, giving them great privileges in the purchasing of certain property. There is no power reserved to them of countermanding a notice once given, in case of disagreement as to terms, but they may summon a jury to ascertain them; that is their protection in case of an exorbitant demand. If they are not bound by their notice, it follows that, after giving it, they are free, during the long period of three years, (allowed by the fourth section of the act,) to take the property or not, at their discretion, and the owner is at their mercy during that time. I cannot think that the legislature so intended. The rule must therefore be made absolute, and the company must go to a jury, which is the security they have provided for themselves by this act.

PARKE J. I am of the same opinion. The company are not bound to purchase the property mentioned in the schedule, but the question is, at what period they shall be said to have exercised their option. Now, I think, that is done when they have given notice, and that, according to reason and good sense, such notice ought to be as binding on them as on the owner or occupier. And this construction, which I should be disposed to put independently of express words in the statute, is supported by the language of sect. 6., which enacts, that if the owners or occupiers shall not,
 for

for the space of twenty-one days after notice, have agreed upon terms of sale, the company “*shall* cause the value and recompence to be enquired into by a jury,” &c. This Court came to a similar conclusion in a late case of *The King v. The Commissioners for improving Market Street, Manchester.*(a) The language of the statute there was different, and I believe there were no compulsory words, but the Court thought, from the general purview of the act, that the commissioners were to be considered as having exercised their option when they gave notice of taking the premises, and that they could not withdraw from it. The case has not been reported, but, I believe, would be found to bear upon the present.

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TAUNTON J. I am of the same opinion. If the notice could be countermanded, the company may state what they consider as a countermand in their return to the mandamus.

PATTESON J. concurred.

Rule absolute.

(a) The KING *against* The Commissioners for improving
MARKET STREET, MANCHESTER.

January 27th,
1831.

A RULE nisi had been obtained on a former day in this (*Hilary*) term, for a mandamus requiring the commissioners to issue their warrant to the sheriff of *Lancashire*, his under sheriff, or one of the coroners, to summon a jury, and enquire into and assess compensation to one *Newall* for certain premises, pursuant to the act 1 & 2 G. 4. c. cxxvi.

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10a + 2.55
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It appeared that on the 28th of *November* 1829, the commissioners gave notice in writing to *Newall* that the messuage or premises, or so much of the same as was requisite for widening *Market Street*, occupied by him or his under tenants, situate in the same street, were wanted for the purposes of the act; and the notice required him to give up possession of the premises or such part thereof, to the commissioners, on the 29th of *November* 1830. Notices were also given to *Newall's* tenants
of

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of the other parts of the premises. In the course of 1829 and 1830 some negotiation took place between *Newall* and the commissioners respecting the purchase, but they could not agree upon terms, and in *December* 1830, the premises still remaining unpurchased, *Newall*, who complained that he was materially injured by the delay, as well as by the proceedings of the company in the improvements they were carrying on, gave them notice to issue their warrant (as above) for summoning a jury; at the same time stating that he was ready to sell at a reasonable price, but persisted in declining the offer already made. On the part of the commissioners, affidavits were put in, stating that their funds were limited, and subject to the payment of interest on a very large debt, and that they were under restriction as to borrowing further sums; that they gave the notices merely with a view of being enabled to take any favourable opportunity which might occur for purchasing, (there being no power given them by the act to remove any party without such notice,) but not with any final determination to purchase at all events; that the sum demanded was unreasonable, and that *Newall*, though he claimed compensation for good-will, had refused to give any estimate of it; that if a jury gave any sum at all approaching that now demanded, it was doubtful if the funds would be adequate for a considerable time; and that the improvement to be effected by taking the premises in question would not, in the judgment of the commissioners, warrant such an expense.

The act 1 & 2 G. 4. c. cxxvi. empowered the commissioners, by sect. 23., to purchase certain premises described in a schedule, by agreement with the owners, or if an agreement could not be come to, then by assessment as after mentioned. By sect. 27., if part only of any premises were wanted, the commissioners were required to purchase the whole, if the owners were unwilling to sell part. By sect. 31. it was enacted as follows: — That if the owners, &c. shall neglect or refuse to treat, or shall not agree with the commissioners, “the sheriff of the said county of *Lancaster*, or his under sheriff, or some one of the coroners of the said county, shall, upon the warrant of the said commissioners, and he and they is and are hereby required and authorized to cause it to be enquired into and ascertained upon the oaths of a jury, &c., (which oaths the said sheriff, &c. is and are hereby empowered and required to administer), what damages will be sustained by, and what recompence and satisfaction shall be made to such owners,” &c. and shall assess and award the sum to be paid for the purchase of such houses, &c., and also for good-will, &c.; and the sheriff, under sheriff, &c. is empowered and required to summon witnesses, and examine them on oath, and shall order a view if necessary, and use all other lawful ways and means for information; and after verdict the sheriff, &c. shall order the sum assessed to be paid by the commissioners; and the verdict shall be final. “And for the summoning and returning of such jury or juries the said commissioners are hereby empowered to issue their warrant or warrants to the said sheriff, &c. to summon, impanel, and return at
some

some convenient place in the said town of *Manchester*, a jury of not less than thirty-six, nor more than forty-eight, &c; and twenty-one days notice shall be given to the owners, &c. interested in the premises; and the said sheriff, &c. is empowered to impanel, summon, and return such number accordingly, out of whom he shall swear twelve to be the jury for the purposes aforesaid." By sect. 37. no occupier of any house, &c. shall be liable to be removed from the possession thereof by virtue of this act until the expiration of twelve calendar months after notice in writing shall have been given him by the commissioners that such house, &c. will be wanted for the purposes of the act, nor until they shall have paid the compensation agreed upon or assessed in that behalf. By sect. 43. the powers of this act, so far as they are compulsory upon owners, &c. to sell any messuages, &c. for the purposes of the act, shall cease from and after the expiration of twelve years from the passing thereof.

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Courtenay and *Wightman* now shewed cause against the rule for a mandamus, which was supported by *Cross Serjt.*

The Court made the rule absolute, and the mandamus issued.

In the ensuing *Easter* term the commissioners made their return to the mandamus, containing similar statements to those sworn to in their affidavits in opposition to the rule; they also alleged, that in the course of the year after the giving of their notice, they had been obliged by a vote of the ley-payers to make new purchases, by which great expense would be incurred, and that a great part of the premises for which *Newall* required compensation, had been bought by him with a full knowledge that they, or part of them, would be required for the purposes of the act; they further stated that a very small portion of the premises was in fact requisite for those purposes; and that the commissioners had not, and did not know that they should ever have funds applicable to the payment of *Newall's* demands.

A rule was afterwards obtained, calling on the commissioners to shew cause why the return should not be quashed, and a peremptory mandamus issue. In *Trinity* term *Courtenay* and *Wightman* shewed cause, and *Cross Serjt.* supported the rule.

June 7th,
1831.

The Court made the rule absolute.

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Saturday,
Nov. 24th.

BELSHAW *against* **CHAPMAN MARSHALL**, Esquire,
HENRY POLAND, Esquire, **PHILIP SELBY**, and
GEORGE ROBINSON.

A sheriff executing a fi. fa. after notice of the allowance of a writ of error, is liable in trespass, though there has been no further supersedeas of the execution.

Notice to the sheriff of such allowance is notice to his officers, and renders them liable in trespass for proceeding with the execution.

2^d Dec. 8th.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and seizing and detaining his goods. Pleas, by *Marshall* and *Poland*, the general issue, and justification, as sheriff of *Middlesex*, under a fi. fa. Replication, that after the judgment, and before the issuing of the fi. fa., a writ of error issued directed to the Chief Justice of the Common Pleas (in which Court the judgment was given) commanding him to return the proceedings into the Exchequer Chamber, which writ of error was duly allowed, and at the time when, &c. was in force, and was a supersedeas to the fi. fa.; and that before the time when, &c. the plaintiff duly gave notice to all the defendants of the writ of error and the allowance thereof, and duly required them to cease to execute the writ, but that they neglected and refused to comply, and after such notice committed the trespasses. Rejoinder, that the plaintiff did not duly give notice to the defendants *Marshall* and *Poland* of such writ of error and the allowance thereof, nor duly require them to cease to execute the writ: and upon this issue was tendered and joined. The defendants *Selby* and *Robinson* pleaded, first, the general issue, and, secondly, a justification by *Selby* as sheriff's bailiff, and *Robinson* as the servant of *Selby*, under a warrant issued by the sheriff in pursuance of the above-mentioned fi. fa. The replication was the same as that above stated.

joinder,

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joinder, that before the time when, &c. the plaintiff did not give notice to *Selby* and *Robinson* of the writ of error and allowance thereof, nor require them to cease, &c. Issue thereon. At the trial before Lord *Tenterden* C. J. at the sittings in *Middlesex* after *Easter* term 1832, it appeared that the writ of execution was issued, and the warrant thereupon made and delivered to the officers, on the 3d of *December* 1830, and they on that evening, between seven and eight o'clock, entered the plaintiff's premises and took possession. On the same 3d of *December*, about five in the evening, a clerk of the plaintiff's attorney served a copy of the allowance of the writ of error (at the same time producing the original) at the sheriff's office in *Red Lion Square*: he also served another copy shortly after on the attorney for the party at whose suit the judgment had been signed. The same evening, about eight o'clock, the plaintiff's attorney went to the premises where the officers were in possession, shewed them the original allowance, told them that it operated as a supersedeas, and warned them against proceeding with the execution: he also informed them that the allowance had been served at the sheriff's office, and on the attorney for the party who had obtained judgment. The officers did not withdraw. No distinct evidence was given as to the hour at which the writ of execution came to the sheriff's office, or when the warrant was issued; but *Selby* had stated that he did not receive the warrant till seven that evening. It was urged on behalf of the defendants, that the sheriff could not be considered as having due notice to cease from executing the *fi. fa.* till he was served with a writ of supersedeas, and that at all events no regular notice appeared to have been given to the officers.

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against
MARSHALL.

Lord *Tenterden*, in summing up, stated the question for the jury to be, whether the allowance of the writ of error was served at the sheriff's office before or after the writ of execution came there: in the former case, he directed them to find for the plaintiff; in the latter, for the defendants. The jury were of opinion that the allowance arrived first at the office, and gave a verdict for the plaintiff. Leave having been given to move to enter a nonsuit,

Campbell, in last *Trinity* term, moved for a rule nisi to that effect, or for judgment non obstante veredicto. (a) The principal question is, whether a sheriff, acting under a fi. fa. regularly sued out, can be made a trespasser by merely having been served with the allowance of a writ of error, no supersedeas having issued. It is undoubtedly established by *Perkins v. Woolaston* (b), *Meagher v. Vandyck* (c), *Braithwaite v. Brown* (d), and other cases (e), that a writ of error operates as a supersedeas from the time of allowance, even without notice served. But to what purpose does it so operate? To stay execution, but not to make the sheriff a trespasser, when the allowance which is to make him so has perhaps been kept secret by the party interested. So long as there is no actual supersedeas issued, the fi. fa. is a justification to the sheriff, though, by the practice of the Court, the allowance of a writ of error supersedes the execution. At all events the officers are not liable, for there was nothing which could be construed as notice to them till they had entered to make the levy. [*Parke J.* In

(a) Before Lord *Tenterden C. J.*, *Littledale J.*, and *Parke J.*

(b) 1 *Salk.* 322.

(c) 2 *B. & P.* 370.

(d) 1 *Chitt. Rep.* 238.

(e) See 2 *Wms. Saund.* 101 g.

Bleasdale

Bleasdale v. Darby (a), it was held by *Wood B.* that trespass would lie against the plaintiff and the sheriff, where a *fi. fa.* had been issued and executed after the allowance of a writ of error had been served. Is there any precedent of the actual issuing of a *supersedeas* by the Court in a case like this? The statute 3 *Ja.* 1. c. 8. provides, that in the actions there enumerated no execution shall be stayed by any writ of error, *or supersedeas thereupon to be sued*, unless the plaintiff in error shall, before such stay made *or supersedeas to be awarded*, enter into recognizance as required by that act.

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against
MARSHALL.

Cur. adv. vult.

PARKE J. on this day delivered the judgment of the Court. We have looked into the authorities, and are clearly of opinion that the notice of the allowance of a writ of error was sufficient to render the sheriff liable in this action, without any *supersedeas* being issued; nor does there appear to be any precedent for such a proceeding: and notice to the sheriff was notice to the officers. There will, therefore, be no rule.

Rule refused (b).

(a) 9 *Price*, 606.

(b) See *Meriton v. Stevens*, *Willes*, 271.

JOHN and THOMAS WAGSTAFF *against* WILSON.

TRESPASS for taking away a horse. At the trial before *Parke J.*, at the last Summer assizes for *Yorkshire*, the plaintiffs, to shew that the taking was authorized

A letter written to the plaintiff's attorney before action brought by the attorney who afterwards appears in the

cause for the defendant, is not evidence of a fact admitted therein, without further proof that the defendant authorized the communication.

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by the defendant, put in a letter written before the action was commenced, by Messrs. *Smith* and *Hinde*, the attorneys who afterwards acted for the defendant in the cause. The plaintiffs' attorney had written two letters to the defendant, which he received; the first charging him with having seized the horse under a mistaken supposition, and demanding it back; the second complaining that the horse had not been returned but sold, and threatening legal proceedings unless reparation were made. The answer, signed by Messrs. *Smith* and *Hinde*, was as follows:—"Dear Sir, Mr. *Wilson* has brought us your letter of the 16th instant, respecting a horse belonging to Mr. *William Storey*, his tenant, distrained for rent in arrear. We are fully prepared to prove that the horse in question was legally distrained, with other chattels, by Mr. *Wilson's* authority, and was afterwards removed from the premises by your client or his agents, and therefore we think Mr. *Wilson* justified in the steps he has taken. We are," &c. There was no proof that the letter had been written with the defendant's sanction, except that one of the writers was his attorney on the record. No answer was sent by the defendant himself. The learned Judge thought the letter not admissible, and the plaintiff was nonsuited.

Hoggins (in the early part of this term) moved for a rule to shew cause why there should not be a new trial, on the ground that the letter ought to have been received, being written in answer to a communication upon the subject matter of the action, and by the party who was now the defendant's attorney on the record; and he cited *Marshall v. Cliff* (a), *Roberts v. Lady Gresley* (b),

(a) 4 Camp. 133.

(b) 3 Car. & P. 380.

Peyton v. The Governors of St. Thomas's Hospital (a),
and *Wilmot v. Smith* (b).

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PARKE J (c). In *Marshall v. Cliff* (d), the attorney's letter relied upon to prove the joint-ownership of the defendants, contained an undertaking to appear for them. That was a step in the cause. In *Roberts v. Lady Gresley* (e), the party whose letter was produced, and whose agency was relied upon, had already acted in the business as agent for the defendant, and Lord *Tenterden* thought there was evidence to go to the jury that he continued so when the letter was written. The other cases are clearly distinguishable. There is no ground for a rule.

TAUNTON J. and PATTESON J. concurred.

Rule refused.

(a) 3 Car. & P. 363.

(b) 3 Car. & P. 453.

(c) This case was moved before DENMAN C. J. took his seat on the bench.

(d) 4 Camp. 133.

(e) 3 Car. & P. 380.

the same amount, and in the same terms, and appealed against; and on the hearing of an appeal against one of these rates in *January* 1830, the sessions amended the same by striking out the words “*and that part of the river Aire,*” subject to the opinion of the Court of King’s Bench on the question whether the company were rateable for *dams* on the river; and that Court on the 21st of *January* 1832(a) made a rule that the rate should be sent back to be amended by reducing it from 150*l.* to 15*l.* 16*s.*, the amount chargeable on the canal and lock. At the *April* sessions 1832 the rates were reduced from 150*l.* to 15*l.* 16*s.* pursuant to the rules of Court. A demand was afterwards made on the overseers of *Brotherton* for the difference in amount between the sums due from the company on the rates as ultimately amended, and the sums paid to the overseers of *Brotherton*, under the distress in *December* 1828, and afterwards upon the subsequent rates. At the *October* sessions, an application was made by the company for an order of sessions on the overseers to refund the sums of money so paid to them, after deducting the amount of the several rates chargeable. That court refused to make any order, on the ground that the application ought to have been made at the *April* sessions, when the rates were altered. A rule nisi having been obtained for a mandamus to the justices to make the order,

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Alexander and *Bliss* now shewed cause. The application for an order on the overseers to refund ought to have been made to the same court of quarter sessions which ordered the rate to be reduced. The stat. 41 G. 3. c. 23. s. 8. enacts, “that if on the hearing of any appeal from any rate for the relief of the poor, the court of

(a) See 3 B. & Ad. 139.

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general or quarter sessions shall order the sum rated on any person to be decreased or lowered; and it shall be made appear to the said court that such person has, previously to the hearing of such appeal, paid any sum of money in consequence of such rate which he ought not to have paid or been charged with, then and in every such case the *said court* shall order such sum to be repaid and returned to the person having paid the same, together with all reasonable costs occasioned by such person having paid or been required to pay the same." It is manifest from the words *said court*, and "on the hearing of any appeal," that the legislature intended the application for an order of repayment to be made to the same court of general or quarter sessions which ordered the sums assessed on any person to be lowered. The power given by the statute is not an original power, but annexed to the appellate jurisdiction, like the authority to award costs. Here it ceased with the *April* sessions.

Sir *James Scarlett* and *Wightman* contra. The statute ought to receive a liberal construction; and so construing it, the words *said court* signify the sessions generally, and not the justices who compose any specific court of general or quarter sessions. It was impossible here to apply for the order to the justices who heard the appeal, for they had ceased to constitute a court of quarter sessions before it had been ascertained by the decision of the Court of King's Bench that the sums paid were not due.

DENMAN C. J. The motion ought to have been made either to the court of quarter sessions which heard the appeal, or to the court which ordered the sums rated
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on the company to be decreased or lowered. The application here was too late.

LITTLEDALE J. concurred.

TAUNTON J. The court of quarter sessions had no power to order money improperly paid to overseers to be refunded until this statute gave it them; and the statute limits the power to the court of sessions which heard the appeal, or at least to the court which orders the sums rated on any person to be lowered. No application was made in this case to either the one or the other.

PATTESON J. concurred.

Rule discharged.

The KING *against* E. O. JONES and Others.

Saturday,
Nov. 25th.

INDICTMENT stated that "on, &c. (1828) at, &c. a commission of bankrupt founded on the statute made and then in force concerning bankrupts, was duly awarded and issued against *E. O. Jones*, directed to the commissioners therein named, thereby giving them authority to proceed according to the statute with the body of the said *E. O. Jones*, as also all his lands which he had in his own right *before he became bankrupt*, &c. by virtue of which said commission, the commissioners found that the said *Jones* did become a bankrupt within the true intent of the said statute before the suing forth of the said commission, and did adjudge him to be a bankrupt accordingly." It then charged that all the defendants, contriving and intending to cheat the creditors of *Jones* on, &c. at, &c. unlawfully did conspire to conceal and embezzle

Indictment, after stating that a commission of bankrupt had issued against *A.* by virtue of which the commissioners adjudged him to be a bankrupt, charged that he and other defendants conspired to conceal a part of his personal estate: Held, that even since the stat. 6 G. 4. c. 16. s. 112. such an indictment is defective for not shewing that the party had actually become bankrupt.
9 Q. B. 69.
12 Q. B. 12.
/ B. C. 656.

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against
The Justices of
St. Peter's
Liberty, YORK.

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against
Jones.

embezzle a great part of the personal estate of *Jones* so then having been declared and adjudged a bankrupt, that is to say, twenty-two Bank of *England* notes for 100*l.* each, and in pursuance of such conspiracy, *Jones* did deliver to *E. T.*, (one of the defendants,) and *E. T.* did, in pursuance of the said conspiracy, receive and have from *Jones* the said several bank notes of him *Jones* so then declared bankrupt, to the intent that the same might be removed, concealed, and embezzled. Plea, not guilty. The defendants having been convicted at the *Bristol* Summer assizes 1831, a rule nisi was obtained for arresting the judgment, on the ground that the indictment was defective in not stating the petitioning creditor's debt, the trading, and the act of bankruptcy.

Merewether Serjt. now shewed cause. It must be conceded that so long as the 5 G. 2. c. 30. was in force, an indictment against a bankrupt for removing or concealing his goods must have stated a petitioning creditor's debt, a trading, and an act of bankruptcy. But that statute (by sect. 1.) made it felony in any person *who had become a bankrupt*, and against whom a commission had issued, to conceal any part of his personal estate to the value of 20*l.* This is repealed by 6 G. 4. c. 16., which by sect. 112. makes it felony if any person *against whom a commission has been issued, and who has been thereupon declared bankrupt*, shall not surrender himself, &c.; or if any such bankrupt shall remove, conceal, or embezzle any part of his estate to the value of 10*l.* It is sufficient, therefore, since the latter statute, for an indictment to allege the issuing of the commission, and the adjudication that the party was a bankrupt. [*Parke* J. According to your argument, if

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a commission issued against a person who was not a trader or not indebted, he would be liable to be transported for seven years if he did not surrender and discover his estate, as required by the statute. The words "*such* bankrupt" in sect. 112. mean a person not merely declared a bankrupt by the commissioners, but a person liable to be so declared.] The legislature had in view the enactments of the 5 G. 2. c. 30., when they passed the 6 G. 4. c. 16., for the former act is recited in the preamble. But, independently of this point, the indictment is good, because it charges that the defendants conspired to do an unlawful act. [*Parke J.* The concealment of *Jones's* goods was not an unlawful act, unless he had duly become bankrupt.]

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Bompas Serjt. and *Crowder* contra. The Court, in construing an indictment, will not infer that the words therein used constitute a crime if they will bear any other construction. Now it is consistent with the allegations of this indictment, that *Jones* may have been illegally, and without jurisdiction, declared bankrupt; and if so, he had a right to conceal his own goods. The words of sect. 112. "if any such bankrupt shall remove, conceal, or embezzle," &c. refer to the section which describes the persons against whom a commission may issue, and sect. 12. authorizes the Lord Chancellor to issue a commission, on a petition made to him in writing against *any trader having committed an act of bankruptcy*, by any creditor of such trader. A commission, therefore, can only be lawfully issued upon the petition of a creditor against a trader who has committed an act of bankruptcy. Sect. 31. provides, that when an action is brought against any person appointed by the commissioners for any thing done

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done in obedience to their warrant, there must be a previous demand of a perusal and copy of such warrant, and a refusal to give the same for six days after such demand; and if after such demand, and compliance therewith, any action be brought against the person so appointed without making the petitioning creditor defendant, the jury, on production of the warrant, shall give their verdict for the defendant, *notwithstanding any defect of jurisdiction* in the commissioners. The statute, therefore, contemplates a case where the commission issued in due form might, nevertheless, be invalid, and give no title to the parties acting under it. If, according to the argument urged on the other side, the words "any such bankrupt" in sect. 112. may mean a person against whom an invalid commission has issued, it will follow that the bankrupt might be liable to an indictment for felony, for concealing goods which in fact were his own property, and which he might be entitled to recover in an action. That never could have been intended. The words, "if any person against whom any commission has been issued, or shall hereafter be issued, whereupon such person hath been or shall be declared bankrupt," must be construed to mean where he has legally been declared bankrupt.

DENMAN C.J. It is quite clear, that if this indictment had charged *Jones* with felony, it would have failed, because it does not contain averments that he was a trader, &c. or had become bankrupt. The question then is, whether the indictment be good, because it charges a conspiracy to defraud the creditors of a bankrupt against whom a commission had issued *de facto*. The same answer applies in either case. If the party against whom the commission issued was not a trader,
the

the commission was illegal. The indictment ought to charge a conspiracy, either to do an unlawful act, or a lawful act by unlawful means. Here the indictment charges a conspiracy to remove and conceal the goods of *Jones*; but if the commission was bad, *Jones* had a right to remove them. If we were to hold such an indictment good, it would follow as a consequence, that a party who was entitled to recover goods in an action, if taken from him, might be declared a felon for removing the very same goods. There is nothing stated on the face of this indictment to constitute an offence.

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PABKE J. I am of the same opinion. This indictment ought to have shewn a conspiracy to do an unlawful act, or to do a lawful act by unlawful means. Now it does not state enough to shew that the defendants conspired to do any unlawful act; it ought to have alleged, not merely the issuing of a commission of bankrupt, but that there had been a trading by *Jones*, and a petitioning creditor's debt, and that he became bankrupt. Without such allegations the indictment would clearly have been insufficient under the statute 5 G. 2. c. 30., and then that reduces it to the question whether an offence is charged within the statute 6 G. 4. c. 16. I think it is not. Section 112. implies that the commission therein mentioned shall have duly issued. The twelfth section shews that a valid commission could issue only against a trader who had committed an act of bankruptcy, and upon the petition of a creditor.

TAUNTON J. The indictment ought to contain averments of all matters necessary to constitute the offence; it is not sufficient merely to allege matter which makes it

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it probable that an offence has been committed. It was not enough to shew in this case that a commission issued, or that the commissioners adjudged the party to be a bankrupt. He must actually have become bankrupt. This indictment sets out the commission in part, and states that the commissioners were directed to proceed with the lands which *Jones* had in his own right, &c. *before he became bankrupt*. The commission, therefore, issued on the supposition that the party had become bankrupt. But the indictment ought to have shewn distinctly that he had become so. It is consistent with all the allegations, that *Jones's* goods may have been seized unlawfully, he never having subjected himself to the jurisdiction of the commissioners; and if this were so, it was not an unlawful act in him to remove or conceal them. The indictment is, therefore, defective.

PATTESON J. It is conceded that so long as the statute 5 G. 2. c. 30. was in force, it was necessary to shew, in such an indictment as this, that a valid commission had issued against the person adjudged a bankrupt; but it is said that the law in this respect is altered by the statute 6 G. 4. c. 16. s. 112. It is quite clear that if the removal of the goods by *Jones* would not have been illegal, a conspiracy by him and the other defendants to remove them is not, unless the means used for that purpose were unlawful, which is not alleged. The question, then, is, did the legislature mean to enact that a person against whom an illegal commission of bankrupt issued should be guilty of felony if he removed his own goods? Without an express enactment to that effect, I could not come to such a conclusion. I think the words "such bankrupt," in s. 112., import, not merely a person
against

against whom a valid commission has issued, but one who has become bankrupt. The rule for arresting the judgment must be made absolute.

Rule absolute.

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CAREW *against* EDWARDS.

Monday,
Nov. 26th.

DEBT on bond. Pleas, first, non est factum; secondly, bankruptcy. At the trial before *Patteson J.*, at the *Middlesex* sittings after *Hilary* term 1832, the following appeared to be the facts of the case. The defendant had, some years ago, and since the date of the bond, been discharged under an insolvent debtor's act, but the bond had not been inserted in the schedule; a commission of bankrupt had afterwards been issued against him, under which he obtained his certificate before the 2d of *May* 1825, on which day the statute 6 G. 4. c. 16. received the royal assent, but his estate had not produced 15s. in the pound. It was contended for the plaintiff that he was entitled to a verdict and judgment against the effects of the bankrupt by the 5 G. 2. c. 30. s. 9., and for the defendant that by 6 G. 4. c. 16. s. 127. his effects were vested in his assignees, and his certificate an absolute bar to the action. The learned Judge directed a verdict for the plaintiff. A rule nisi for a new trial was obtained upon the ground that the certificate barred the action.

Sir *J. Scarlett* and *Follett* now shewed cause. It never could have been the intention of the legislature

wards sued on a bond executed before his discharge under the insolvent act, in his schedule, it was held, that his certificate did not bar the action.

that

The statute 8th E. 4th 6 G. 4. c. 16. s. 127., which vests in assignees the future effects of a bankrupt who had before been bankrupt, or taken the benefit of an insolvent act, and has not paid 15s. in the pound under the subsequent commission, does not apply to a bankrupt who had obtained his certificate under such subsequent commission, before that statute passed; and, therefore, where *A.*, after being discharged under an insolvent act, had a commission of bankrupt issued against him, and obtained his certificate before the passing of 6 G. 4. c. 16., but did not pay 15s. in the pound, and he was afterwards sued on a bond executed before his discharge under the insolvent act, but not inserted

1 B. & C. 660.

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that the 127th section of the new bankrupt act should make the certificate obtained by every bankrupt since the passing of the 5 G. 2. c. 30. under the circumstances mentioned in s. 9., a bar to subsequent actions by the creditors. The 135th section enacts, “that nothing herein contained shall affect or lessen *any right, claim, demand, or remedy which any person now has* under any commission of bankrupt, or upon or against any bankrupt against whom any commission has or shall have issued, except as is herein specifically enacted.” Now here the plaintiff had at the time of passing that statute a demand upon the bankrupt, to which his future effects were liable, and there is no specific enactment which takes away that right.

White contra. The words of section 127. are retrospective as well as prospective. They are “if any person who shall have been discharged by any insolvent act, shall be or become bankrupt, and *have obtained or shall hereafter obtain* such certificate as aforesaid.” They evidently include a person who had already obtained his certificate at the time of passing the statute. So section 121. enacts, “that every bankrupt who *shall have duly surrendered* and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt.” In *Robertson v. Score* (a), the Court intimated an opinion that section 127. applied to cases where the *first* certificate was granted under a commission issued before the passing of the act; the same construction applies where the second was so granted.

Cur. adv. vult.

(a) 3 B. & Ad. 338.

DENMAN

DENMAN C. J. now delivered the judgment of the Court. This was an action on a bond. The defendant pleaded, first, non est factum; secondly, his bankruptcy. It was proved at the trial that the defendant had been discharged under an insolvent debtors' act some years ago, and since the date of the bond, but that the bond had not been inserted in his schedule; that a commission of bankrupt had since that discharge been issued against him, under which he obtained his certificate in 1825, before the day on which the statute 6 G. 4. c. 16. received the royal assent, but the estate had not produced 15s. in the pound. Under these circumstances the plaintiff contended that he was entitled to a verdict, and judgment against the effects of the defendant, under the 5 G. 2. c. 30. s. 9. The defendant, on the other hand, contended that by the 127th section of the 6 G. 4. c. 16. his effects were vested in his assignees, and therefore that his certificate was an absolute bar to the action, according to the case of *Robertson v. Score (a)*, in which the certificate pleaded in bar had been obtained after the passing of the 6 G. 4. c. 16., a former certificate having been obtained by the party, *under a commission issued before that act*. The question, therefore, is, whether the 127th section of the 6 G. 4. c. 16. has a retrospective operation, so as to vest in the assignees of a bankrupt under a second commission, where the estate does not pay 15s. in the pound, and where the bankrupt has obtained his certificate under the 5 G. 2. c. 30., those effects which did not vest in his assignees under that act, but were liable to be taken in execution by his creditors. The language of the 127th section of the

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(a) 3 B. & Ad. 338.

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6 G. 4. c. 16., which appears to have been taken with some omissions from the 9th section of the 5 G. 2. c. 30. (a), is by no means clear, and it is extremely difficult to collect from it whether the legislature intended to alter the effect of a certificate obtained prior to that act or not. If it did, the rights of creditors, and of the bankrupt himself, would be much affected; and by the 135th section of the act, we find it enacted "that nothing herein contained shall render invalid any commission of bankruptcy now subsisting, or which shall be subsisting at the time this act shall take effect, or any proceedings which may have been had thereunder, or affect or lessen any right, claim, demand, or remedy which any person now has thereunder, or upon or against any bankrupt against whom any commission has or shall have issued, except as is herein *specifically* enacted."

Now we cannot find any words in the 127th section by which the right of a creditor, situated as the plaintiff was, to sue the bankrupt and recover a judgment, and have execution against his effects, is *specifically* and *expressly* taken away, or the effects of a bankrupt situated as this defendant was, are specifically and expressly vested in his assignees.

We think, therefore, on these grounds, that the certificate is no absolute bar in the present case, and the grounds of our judgment leave the case of *Robertson v. Score* wholly untouched.

Rule discharged.

(a) This latter clause is in express terms made prospective only, both as to the first and second certificate.

1832.

The KING on the Prosecution of the Rev. H. SMITH, Executor of the late Lady BLAKE, *against* BLAKE.

Monday,
Nov. 26th.

THE defendant, on the 12th of *May* 1832, had been arrested by an officer of the sheriff of *Surrey*, under a warrant granted upon a writ de contumace capiendo, issued out of the Court of Chancery into the county of *Surrey*. On the 17th of *May* he was brought before *Patteson J.* at *Serjeant's Inn*, by writ of habeas corpus, to apply for his discharge, on the ground that the first mentioned writ was irregular, not having twenty days between the teste and return, as required by 5 *Eliz. c. 23. s. 2.* The learned Judge desired him to be brought up again on the following morning, when he ordered him to be discharged out of custody as to the first mentioned writ. The sheriff's officer had the defendant in custody at *Symond's Inn Coffee House* until the discharge or liberate was brought, and then left him, and in less than two minutes afterwards an officer of the sheriff of *Middlesex* came into the room and arrested the defendant on a warrant granted on another writ de contumace capiendo, issued out of Chancery for the same matter for which he had been arrested by the sheriff of *Surrey*, and returnable on the 23d of *May*. An application was then made to *Patteson J.* to discharge the defendant, on the ground that he was

A defendant arrested on an irregular writ de contumace capiendo, was brought up by habeas corpus before a Judge, to be discharged. Immediately after his discharge, and before he had time to return home, he was again arrested on a similar writ, for the same matter: Held, that he was protected from arrest redeundo.

The second writ was sued out of Chancery without any return made to the first; nevertheless it was held to be regular.

The stat. 1 *W. 4. c. 3. s. 2.*, which enacts, that all writs returnable in the King's Bench, Common Pleas, or Exchequer, on general

return days, may be made returnable on the third day exclusive before the commencement of each term, &c.; and the day for appearance shall as heretofore be the third day after such return, exclusive of the day of the return, &c., applies to all writs, not merely to those on mesne process, and consequently it extends to a writ de contumace capiendo.

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protected redeundo. The learned Judge in the first instance refused to discharge him, but afterwards did so on his entering into a recognizance to appear before the Court, in order that the question might be decided whether he was improperly arrested on the second writ. A rule nisi was obtained for quashing the writ on three grounds: first, that the defendant was privileged from arrest redeundo; secondly, that the last writ de contumace capiendo was irregular, for that a *capias* ought to have issued out of K. B. after the former writ; and thirdly, that the writ, being made returnable on the 23d of *May*, was irregular. It appeared by an affidavit in answer to the rule, that it was the invariable practice in the cursitor's office to issue one or more writs de contumace capiendo either in one or more counties running at the same time, or into the same counties from time to time as often as occasion might require, upon production of the former writs, and proof given of their never having been executed or taken effect by caption.

Sir *J. Scarlett* and *Hoggins* shewed cause on a former day. The defendant was not privileged from arrest either during the time he was attending before the Judge or on his return from such attendance, because, the writ of habeas corpus having been sued out by him, he must be taken to have attended voluntarily. *Rex v. Sir F. Delaval* (a) will be relied on by the other side. There Lord *Mansfield* said, "wherever the Court does not think fit to deliver the parties into any special custody, it will privilege them redeundo. If the Court refuses that, it impliedly directs the parties to break

(a) 1 *Sir W. Blackst.* 410.

the peace, even in *Palace Yard*." There he manifestly contemplated the case of an illegal restraint without authority; but in this case the caption and custody under the first writ would have been legal, if the cursitor had not committed an error in the form. In cases of subpoena, the privilege is allowed to the witness, because he attends the Court by its command, and with a view to the administration of justice. If there had been a detainer against the defendant, he would not have been discharged as to that. Then it is said that the second writ was irregular, because a *capias* ought to have issued after the first; but by the stat. 5 *Eliz. c. 23. s. 4.*, a *capias* is to issue where the sheriff has returned *non est inventus*. Here he made no such return, and could not, because he had the defendant in custody. Thirdly, the writ is made returnable pursuant to the 1 *W. 4. c. 3. s. 2.*, which enacts, that all writs returnable on general return days, may be made returnable on the third day exclusive before the commencement of each term, or on any day not being *Sunday* between that day and the third day exclusive before the last day of the term. Here the term began on the 26th of *May*, and the 23d was the third day exclusive before the first day of term.

Follett contra. The privilege from arrest extends to all persons resorting, *bonâ fide*, to a competent tribunal; even parties to a suit. A plaintiff, who institutes a suit, may in some sense be said to attend the trial of a cause voluntarily; but he has the privilege. It extends also to bail, and to a barrister or attorney attending the courts in the exercise of his professional duty. Secondly, here the party prosecuting the writ has pro-

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ceeded irregularly, for, the writ de contumace capiendo having been delivered out to the sheriff, a capias ought to have issued out of K. B. The 53 G. 3. c. 127. s. 1. substitutes the writ de contumace capiendo for that of excommunicato capiendo, and directs that the provisions contained in the 5 *Eliz.* c. 23., as to the latter writ, be applied to the writ de contumace capiendo. Now, sect. 2. of that statute enacts, that every writ of excommunicato capiendo that shall be granted out of Chancery shall be returnable in K. B., and that, after it shall be sealed, it shall be brought into that Court and there delivered of record to the sheriff; and if the sheriff make default in returning it at the day, he is subject to be fined. [*Taunton J.* Sect. 4. enacts, that if the sheriff return non est inventus, the justices of K. B. are to award a capias. Here no return has been made to the first writ, whereon to found a capias. *Denman C. J.* In *Rex v. Eyre (a)* it was excepted to a second writ de excommunicato capiendo, that a former writ of excommunicato capiendo being enrolled in K. B., the Court of Chancery could not issue a second writ, but by 5 *Eliz.* c. 23., such second writ was to issue from K. B.; but the answer, given at the bar and adopted by the Court, was, that the act related only to the case where the first writ had actually issued, and the sheriff had returned non est inventus. *Parke J.* There can be no doubt that the second writ in this case issued conformably to the practice of the Court of Chancery, as stated in the affidavits.] Then the writ ought to have been returnable in term. The 23d of *May* is not in term. That defect is not cured by 1 *W. 4.* c. 3. s. 2., which section only applies to writs on mesne process, for it enacts that the

(a) 2 Str. 1189.

day for *appearance* shall, as heretofore, be the third day after such return. [*Parke J.* It applies to all writs returnable in the King's Bench, Common Pleas, or Exchequer on general return days. The question is reduced to this, whether a defendant is privileged from arrest in returning from attendance before a Judge on a habeas corpus sued out by himself.]

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against
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Cur. adv. vult.

DENMAN C. J. now delivered the judgment of the Court. In this case, which was argued before us on *Saturday*, all the questions were disposed of but one; and that was, whether the defendant was privileged from being taken under a writ de contumace capiendo. He had been in custody under a former writ of the like nature, and had sued out a writ of habeas corpus; and the learned Judge before whom it was returnable, being of opinion that it was void for want of a proper interval of time between the teste and return, discharged him; whereupon the prosecutor sued out another writ, and apprehended him on it on his way home from the Judge's chambers. And upon consideration we think he was privileged from arrest on this occasion. There is no case to be found in which this privilege has been extended to persons going and returning on a writ of habeas corpus except that of *Rex v. Delaval (a)*, which is, however, not precisely like this case. But as it turned out in this instance, that the defendant's detention under the former writ was wrongful, and he was driven to his habeas corpus to obtain his liberty, it may fairly be considered as coming within the principle whereby parties

(a) 1 *Sir W. Blackst.* 410. 439. 3 *Burr.* 1434. S. C.

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to a suit, for the sake of public justice, are protected from arrest in coming to, attending upon, and returning from the Court. The rule, therefore, must be absolute with costs; Mr. *Blake* to bring no action for this arrest.

Rule absolute.

Monday,
Nov. 26th.

The KING on the Prosecution of THOMAS CORPE
against The Treasurer and Directors of the
ST. KATHARINE DOCK Company.

It is discretionary in the Court either to determine the validity of a return to a mandamus on motion, or to order the case to be set down in the crown paper for argument.

The *St. Katharine Dock Company* were incorporated by act of parliament, which directed that all actions against the company should be prosecuted against the treasurer or a director for the time being; but that the body or goods, lands, &c. of such treasurer

MANDAMUS to the defendants recited that by an act of 6 G. 4. c. cv. certain persons were incorporated by the name of "The *St. Katharine Dock Company*;" that two actions had been commenced in K. B., one at the suit of *G. C. Glyn*, as treasurer of the company, against *Thomas Corpe*, and another at the suit of *Corpe* against *Glyn* as such treasurer; that *Corpe's* action was brought for the recovery of certain sums of money alleged to be due to him from the company; that pending the two actions an order was made by Lord *Tenterden* that all matters in difference between the parties should be referred to an arbitrator, the costs of the causes to be in his discretion; that that order was made a rule of Court; that the arbitrator awarded that *Corpe* had a good cause of action against *Glyn* as such treasurer for the sum of 2560*l.*, and ordered *Glyn*, as such treasurer, to pay *Corpe* on de-

or director should not, by reason of his being defendant in such action, be liable to execution. An action having been brought by *T. C.* against the treasurer as such, and another by the company, in the name of the treasurer, against *T. C.*, all matters in difference were referred to an arbitrator, who awarded that *T. C.* had cause of action against the defendant, as such treasurer, for a certain sum, and directed that the treasurer should pay *T. C.* that sum on demand; and as to the other suit, he awarded that the treasurer, as such, had no cause of action, and ordered him, as such treasurer, to pay *T. C.* the costs on demand: Held, that a mandamus would lie to the treasurer and directors, commanding them to pay the sums awarded.

5 Bnc. 261.

mand

mand that sum, together with the costs of such action, and that the said action should be stayed; and as to the other action, the arbitrator awarded that, at the time of the commencement thereof, *Glyn*, as such treasurer, had not, nor had he then, any cause of action against *Corpe* for the matters therein mentioned, and that the action should be discontinued, and the costs thereof paid by *Glyn*, as such treasurer, to *Corpe* on demand (*a*). The writ then, after stating "that the two several sums awarded had not been paid by *Glyn*," proceeded "to command the treasurer and directors of the company to pay or cause the same to be paid to *Corpe*."

To this writ the treasurer and directors made a return, containing statements, the object of which was to shew that the award was not final, because the arbitrator had not decided one of the matters in difference brought before him. A rule nisi was obtained for quashing the return, on the ground that it did not thereby appear that the arbitrator had not adjudicated upon that particular matter; and the Court, upon cause being now shewn, were of that opinion; but as their judgment on this point turned entirely upon the very special terms in which the return was framed, it has been thought unnecessary to notice it here.

Sir *James Scarlett* and *Platt* shewed cause on the above point; and they further contested the motion on the following grounds. The Court will not quash the return on motion; the case ought to have been set down in the crown paper, as in *Rex v. The Mayor of London* (*b*). Secondly, any objection to the writ

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(*a*) See *Corpe v. Glyn*, 3 B. & Ad. 801.

(*b*) 3 B. & Ad. 255.

itself

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DOCK
Company.

CASES IN MICHAELMAS TERM

itself may be made even after a return. Now, to found an application for a mandamus, there must be a specific legal right, and a want of specific legal remedy, *Rex v. The Archbishop of Canterbury* (a); and, therefore, it will not lie to compel a man to obey an order of sessions, *Rex v. Bristow* (b), or to oblige the Bank of England to transfer stock, *Rex v. The Bank of England* (c), there being a remedy in the one case, by indictment, in the other, by a special action of assumpsit. Here, there is no want of a specific legal remedy; for an action might have been brought on the award, and though it would have been formally against *Glyn*, as treasurer, it would have been, substantially, against the company, and execution might have issued against their effects.

Campbell (Solicitor-General) contra. It is discretionary in the Court to quash a return for insufficiency, on motion, or to order the case to be set down for argument. If the return be clearly bad on the face of it, the Court will quash it on motion. But if the case be one of difficulty, they will, as in *Rex v. The Mayor of London* (d), order it to be brought on in the crown paper. Here the case is devoid of any difficulty, for *Corpe* has a legal right without any practical legal remedy. If he brings an action on the award, it must be against *Glyn*, and the execution, which must follow the form of the judgment, must be against him also. But the 6 G. 4. c. cv. s. 161. expressly provides that the body or goods of the treasurer shall not, by reason of his

(b) 6 T. R. 168.
(d) 3 B. & Ad. 255.

being defendant in any action, be liable to be taken in execution (a). Then, if that be so, *Corpe* is without legal remedy unless a mandamus be granted. The act does not authorize execution to issue against the effects of individual members of the corporation, as in *Bartlett v. Pentland* (b).

1832.

The King
against
The Sr.
KATHARINE
DOCK
Company.

DENMAN C. J. The first question in this case is, whether a mandamus will lie, and it undoubtedly will if the party has no other legal remedy. It does not appear that *Corpe* has any power of taking in execution the goods of the company. An action on the award must be against the treasurer, and the judgment would be against him; and as the execution must follow the form of the judgment, it would be against *Glyn* as treasurer; but the act of parliament incorporating the company provides that the body or goods of the treasurer shall not, by reason of his being defendant in any action, be liable to be taken in execution. Then as to the course of proceeding, I take it to be perfectly clear, that it is discretionary in the Court either to quash the return at once on motion, or to have the case set down in the paper for argument.

PARKE J. The first question in this case is, whether a mandamus should issue. The objection, that it ought not to have issued at all, though it might more properly have been made at the time when cause was shewn against the rule for issuing it, may be made in this stage of the proceeding. Now, as the act of parliament provides, that neither the person nor property of

(a) See *Corpe v. Glyn*, 3 B. & Ad. 801.

(b) 1 B. & Ad. 704.

the

1832.

The KING
against
The ST.
KATHARINE
DOCK
Company.

the treasurer, when made defendant, shall be liable to be taken in execution, it follows that there is no other mode but a mandamus by which payment of this debt can be enforced. In *Wormwell v. Hailstone* (a), where an action was brought against the clerk of trustees of a turnpike road under a statute which permitted the trustees to sue and be sued in the name of such clerk, a verdict having passed for the plaintiff, he sued out execution against the goods of the clerk, and it was held that execution could not issue against that individual personally; but *Tindal* C. J. in delivering judgment, said there could be no doubt that the funds of the trustees might be made answerable for the amount ascertained in the action (in case of a refusal to apply them), either by a mandamus or a bill in equity. As in this case there is no other legal remedy by which the company can be made subject to the payment of its debts, it follows that a mandamus will lie.

TAUNTON J. and PATTESON J. concurred.

Rule absolute.

(a) 6 *Bingh.* 668.

1832.

Ex parte MATANLE.

Monday,
Nov. 26th.

A*ALEXANDER* had obtained a rule, calling upon the marshal of the *Marshalsea* to shew cause “ why *W. G. Matanle*, an attorney of this court, should not be admitted, at all seasonable times, into the interior of the prison of this court, and the rooms of the prisoners therein, in the same way as other attornies of this court usually are.” In support of this application, it was sworn by Mr. *Matanle* that he had been accustomed to go into the prison as other attornies did, but that on the 17th of *June* last he called there “ for the purpose of conversing with one *Joseph Lancaster*, who was, and still is, a prisoner there, and was then, and still is, a client of this deponent;” and he was then refused admittance in consequence of certain alleged misconduct (which he denied) with respect to an order of discharge formerly brought to the prison by him for a prisoner named *Barrett*. He further stated, that he had several clients in the prison, whose interests had been, and were, materially affected by his exclusion. An application had been made to *Littledale J.* at chambers, but he thought he could not make an order upon the marshal for Mr. *Matanle*’s admission. The affidavits in answer stated grounds upon which the supposed misconduct was imputed.

The rule of *Trinity* term, 21 G. 3., which empowers the marshal of the King’s Bench to regulate the admission of persons to visit the prisoners, does not authorize him at his pleasure to prevent an attorney from visiting his client in the prison, but he must have some ground to shew for so doing; provided the attendance of such attorney is on the client’s business, and necessary to, or required by him.

The Solicitor-General now shewed cause. By a rule of Court, *Trin.* 21 G. 3., the marshal is to “ prescribe in what manner, and for how long, visitors shall be allowed

1832.

Ex parte
MATANLE.

allowed to see or stay with the prisoners, according to the circumstances of every case, in his discretion (a).” And if the exercise of that discretion were liable to be questioned, the facts of this case justify the marshal’s conduct. The rule is made for the benefit of prisoners, not of attorneys. The Court then called upon

Alexander in reply. The rule of 21 G. 3. is not the only one on this subject. The rule *Mich. 3 G. 2.* directs, “that the turnkeys of the said prison do diligently attend at the gate or door of the said prison as the duty of their office requires; and do admit all such persons to have access to any of the prisoners as by law are entitled thereto.” It cannot have been intended by the rule of 21 G. 3. that the marshal should absolutely exclude any person, even a professional man, at his discretion, though he may regulate the admission of visitors and their conduct, according to the words of the rule. This Court may control the marshal, and in a case like the present it ought to be shewn to the satisfaction of the Court that the party excluded was not a proper person to be admitted. [*Denman* C. J. The discretion given to the marshal is an answer to such an application as this, unless the facts shew that he has misconducted himself in the exercise of it.] They shew it in this case. If the rule were such as it is assumed to be on the other

(a) “ That the Marshal of the *Marshalsea* of this Court shall permit no persons to enter into the prison without their being first searched to see whether they have any spirituous liquors about them, and that he do not suffer the wives or children of any of the prisoners to lodge in the prison under any pretence whatever. And that the Marshal do prescribe in what manner and for how long visitors shall be allowed to see or stay with the prisoners, according to the circumstances of every case, in his discretion.”

side,

side, the marshal might order the perpetual exclusion of any person at his pleasure.

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DENMAN C. J. We hardly think the description of visitors, spoken of in the rule of 21 G. 3., extends to the party making this application: the rule seems more properly referable to the wives and families of prisoners, and to persons who might be likely to bring in spirituous liquors. An attorney going in upon the business of his client ought not to be excluded unless some ground can be shewn for it. But upon that subject there are in the present case conflicting affidavits. And the affidavits in support of this motion do not say that the attendance of the party was necessary to his client, or had been required by him, or even that it was upon business. The rule must therefore be discharged.

PARKE, TAUNTON, and PATTESON, Js., concurred.

Rule discharged.

Sir WILLIAM LONG, Knight, *against* WORDSWORTH, a Prisoner(a).

PLATT had obtained a rule, calling upon the plaintiff to shew cause why the defendant should not be discharged out of custody on filing common bail. A bill had been filed against the defendant at the plaintiff's suit for debt, and a copy served upon the turnkey, but there was no indorsement upon the copy so served, of

A copy of a bill filed against an attorney or prisoner, does not require the indorsement directed by rule 11. *Hilary*, 2 W. 4. to be made upon the copy of any process served for the payment of a debt.

(a) This case was decided Nov. 16th.

the

1832.

Long
against
Wordsworth.

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the amount of the debt, and the attorney's claim for costs; and it was contended that, by rule II. Hil. 2 W. 4. (a), such indorsement was necessary, and the want of it made the proceeding irregular.

Chandless shewed cause, and contended that the rule, being applicable only to process or copy of process, did not extend to the copy of a bill filed against a prisoner.

Platt contra. A bill is the only mode of commencing a suit against a prisoner, and the policy of the rule applies to it, as well as to what is more properly termed process. [*Patteson* J. We have held that a bill against an attorney is not process within this rule (b).] There the proceeding does not charge the person; there is not, therefore, the same reason for such a rule.

Per Curiam. There is no distinction. No process is served in either case.

Rule discharge

(a) "That upon every bailable writ and warrant, and upon the of any process served for the payment of any debt, the amount of the shall be stated, and the amount of what the plaintiff's attorney claim the costs of such writ or process, arrest, or copy and service and att to receive debt and costs, and that upon payment thereof with days, to the plaintiff or his attorney, further proceedings will be

moved in the bail court, Easter te

1832.

GREEN and Others *against* MITTON, Gent.Monday,
Nov. 26th.

CAMPBELL, Solicitor-General, had obtained a rule to shew cause why the plaintiffs should not be at liberty to amend the bill, issue, and record in this case by substituting a count in detinue for a count in trover, and by adding a count in debt. It appeared that the action was brought for the recovery of certain deeds on which the plaintiffs had advanced money, and which had come into the defendant's hands, and were (as was said) improperly detained by him. On behalf of the plaintiffs it was stated that the bill was drawn in trover by the advice of a special pleader, but the plaintiffs' attorney had lately been informed that it ought to be in detinue; that the object of the action, in whichever form brought, was the same, namely, to recover the above-mentioned deeds: and that the motion was not made with any view but the better attainment of that object. On the other hand it was stated, that the action was commenced as long ago as *Hilary* term 1831; that the plaintiffs were then fully apprised of all the facts; and that they had been put under a peremptory undertaking to try after *Easter* term last. There were conflicting affidavits on the merits.

Plaintiff commenced his action in *Hilary* term 1831, and declared in trover. The parties went to issue, and plaintiff was put under a peremptory undertaking to try. In *Michaelmas* term 1832, having been advised that the action was misconceived, he moved for leave to substitute a count in detinue for that in trover, and add one in debt; and it was sworn that no new ground of action was contemplated. Leave refused.

Sir *James Scarlett* now shewed cause. There is no pretence for changing the form of action as desired here, when the parties are at issue. Where a plaintiff has applied merely to amend a declaration by changing the form from case to debt, the application has been re-

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 GREEN
 against
 MITTON.

jected (a). [*Patteson* J. The Court of Common Pleas has allowed a declaration in assumpsit to be changed to debt, after issue joined and a peremptory undertaking (b)]. That might be on a statement of very peculiar merits: as where the amendment would save an action from being barred by the statute of limitations (c). Here no such merits are stated. If such a motion were acceded to, no limits could be assigned to the practice.

The *Solicitor-General* contra. Justice will be done by the rule, and the defendant cannot be prejudiced. The rule will be drawn so as to provide for the costs to which he may have been subjected by the action being misconceived; and on the merits his situation will not be altered.

DENMAN C. J. It is a great act of indulgence to grant such an application as this, and the Court fear that, by making the rule absolute, they would establish a very inconvenient precedent. Where the parties agree, it may be otherwise; but the amendment being objected to, we cannot grant it. The case in *Taunton* (b), where assumpsit was changed to debt, was under very peculiar circumstances. The rule must be discharged.

PARKE, TAUNTON, and PATTESON, Js., concurred.

Rule discharged

(a) *Levell v. Kibblewhite*, 6 Taunt. 483.

(b) *Billing v. Flight*, 6 Taunt. 419.

(c) *Executors of the Duke of Marlborough v. Widmore*, 2 Stra. 1 Barn. B. R. 408. 418. S. C. See 1 Tidd, 698., 9th edit.

1832.

WALKER *against* SAMUEL GARDNER, JOHN
GARDNER, and JAMES HARRIS.

Monday,
Nov. 26th.

IN the last vacation Sir *James Allan Park* J. made an order at chambers that the judgment signed and execution issued on a warrant of attorney in this cause should be set aside for irregularity, and the warrant of attorney delivered up to be cancelled. During this term Sir *James Scarlett* obtained a rule to shew cause why that order should not be discharged, in support of which application he cited *Osborne v. Davis (a)*.

It appeared from the affidavits for and against the present rule (which were in many respects contradictory), that *Samuel Gardner* had employed *Smallridge*, an attorney at *Gloucester*, to borrow a sum of money for him on mortgage, from one *Walker*, a client of *Smallridge*, and that *Samuel Gardner*, at *Smallridge's* suggestion, induced *John Gardner* to join him in a promissory note for 30*l.*, as a further security for the sum advanced. They were afterwards (*July 1832*) arrested for the amount of the note, and lodged in custody at a public house at *Gloucester*. At four o'clock on that day, after being in confinement about three hours, they sent for *Smallridge*, to confer with him as to an arrangement for their release, and they proposed to him to pay the debt and costs by instalments of 1*l.* per month, but he required that it should be 5*l.* 5*s.* for the first two months, and

A debtor, being arrested, offered a warrant of attorney. The plaintiff's attorney, who had also advised the defendant in previous stages of the business, came at his request to the place where he was in custody, and proposed another attorney whom he brought with him, to read over the warrant of attorney to the defendant, and attest it on his behalf. The defendant acquiesced, but the attorney so introduced was not known to, or sent for by him:

Held, that this was not a compliance with the rule, *Easter, 4 G. 2.* (and see Reg. *Hil. 2 W. 4. I. 72.*) which declares, that no warrant of attorney executed by a per-

son in custody of the sheriff, &c. shall be valid, unless there be present an attorney on his behalf, to be expressly named by him, and attending at his request, to witness it; and the warrant of attorney and proceedings thereon, were set aside for irregularity.

(a) 4 Taunt. 797.

2 B. & C. 773.

B b 2

that

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against
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that they should procure some person to join them in a warrant of attorney to secure the payments. They named the defendant *Harris*, who was sent for, and arrived about nine. Notice of this was given to *Smallridge*, who thereupon sent his clerk to the inn to prepare the warrant of attorney, and about ten o'clock went thither himself with *John Hulls*, another attorney, whom he requested to accompany him for the purpose of attesting the execution: the reason assigned in his affidavit for doing so was, that, as it was late, there might be difficulty in procuring the attendance of an attorney, if the defendants were not provided with one. It was further sworn by *Smallridge* and *Hulls*, that, upon their entering the room, *Hulls* informed the defendants *S.* and *J. Gardner* who and what he was, and stated that it was necessary some attorney should be present to attest the execution of the warrant of attorney, and explain it to them, and enquired whether they had any particular attorney whom they should wish to attend on their behalf; to which they replied that they had not, and they had no objection to *Hulls* doing what was necessary, as they perfectly understood what they were going to do. (This conversation was denied by *S.* and *J. Gardner* in their affidavits in answer, and they stated that *Hulls* was a stranger to them, and not looked upon by them as their attorney, and that, at the time in question, they considered *Smallridge* as acting on their behalf.) The warrant of attorney, for securing 40*l.*, was read over to the defendants, and (as stated on one side, but denied on the other) was explained to them by *Hulls*; it was then executed by them, and attested by *Hulls* in their presence. *Hulls* demanded and received payment of them for his attendance. The defendant *John Gardner*,

ner,

ner, paid one instalment of 5*l.* 5*s.* without making any objection.

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against
GARDNER.

The *Solicitor-General* now shewed cause. *Osborne v. Davis* (a) is no authority, at least in the present case. That was a decision on a rule of the Common Pleas, *Hil.* 14 & 15 *Car.* 2., also adopted in K. B. the same year: but it does not affect the later rule of the Court of King's Bench, *Easter*, 4 *G.* 2., by which the Court (taking notice of great inconveniences following from holding a warrant of attorney to confess judgment by one in custody to be good, if any attorney, though for the opposite party, were present,) ordered, that in future "no warrant of attorney executed by any person in custody of any sheriff or other officer, for the confessing of judgment, shall be valid or of any force, unless there be present some attorney on the behalf of such person in custody, to be expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant of attorney before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof" (b). Here, even upon the affidavits on the other side, it would be necessary to contend that a stranger who happens to be present, though not sent for by the party in custody, may be asked to attest the deed, and supply the place of an attorney on his behalf, which is not the intention of the rule.

(a) 4 *Taunt.* 797.

(b) See 2 *Stra.* 902., 1 *Tidd*, 549., 9th edit., and the rule, *Hil.* 2 *W.* 4. L. 72., 3 *B. & Ad.* 384., to the same effect.

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WALKER
against
GARDNER.

Sir *James Scarlett* contra. Upon the facts stated in support of this application, it cannot be contended that *Hulls* was not an attorney present on behalf of the defendants within the meaning of the rule of Court. *Osborne v. Davis* (a) is applicable to the later rule as well as to that of 14 & 15 *Car. 2.*, and surely *Hulls* was the attorney of the party who paid him.

DENMAN C. J. The rule of Court was certainly violated in this case by *Smallridge*, in taking an attorney to attest this instrument who was not named or sent for by the party in custody. The present rule must, therefore, be discharged; but as an instalment was paid under the warrant of attorney without objection, it must be upon the undertaking of the defendants not to bring any action.

PARKE J. concurred.

TAUNTON J. I am of the same opinion. *Hutson v. Hutson* (b) is decisive on this point. Lord *Kenyon* there observed, "There is great weight in the observation made by the counsel in support of the rule (*Bayley*), that the defendant, under the pressure of an arrest, ought to be considered incapable of waiving the benefit of this rule, and that, at all events, and in all cases, he should be protected by the advice of an attorney expressly attending for him."

PATTESON J. concurred.

Rule (for rescinding the order) discharged.

(a) 4 *Taunt.* 797.

(b) 7 *T. R.* 7.

1832.

Sims and Others *against* BRITAIN and Others.

ASSUMPSIT for money had and received. Plea, the general issue. At the trial before Lord *Tenterden* C.J., at the *London* sittings after last term, the following appeared to be the facts of the case:—

The plaintiffs were surviving joint owners of a ship called the *Princess Charlotte of Wales*, which was in the service of the *East India* Company. Another part owner, now deceased, of the name of *Gribble*, was appointed by all the owners ship's husband. The defendants were employed by *Gribble* as his agents for general purposes, and amongst others, to receive and pay monies on account of this vessel. Beside *Gribble's* general account, there was a separate account kept by the defendants in his name, as managing owner, of the ship's disbursements and earnings: the account between *Gribble* and his co-owners was also kept at the defendants' counting-house. The last two accounts did not correspond, the defendants' commission for managing the ship, and a charge for the hire of their counting-house for the audit of the account between *Gribble* and the owners, being carried through several years to *Gribble's* general account with the defendants by his direction. The defendants always received their directions from him. In order to obtain a final settlement of the freight of this vessel with the

A., *B.*, and others, were owners of a ship in the service of the *East India* Company. *B.* was managing owner, and employed *C.* as his agent for general purposes, and amongst others, to receive and pay monies on account of the ship; and *C.* kept a separate account in his books with *B.*, as such managing owner. To obtain payment of a sum of money due from the *East India* Company on account of the ship, it was necessary that the receipt should be signed by one or more of the owners, besides the managing owner, and upon a receipt signed by *B.* and one of the other owners, *C.* received on account of the

ship 2000*l.* from the *East India* Company, and placed it to *B.'s* credit in his books, as managing owner. The part owners having brought money had and received, to recover the balance of that account: Held, that *C.* had received the money as the agent of *B.*, and was accountable to him for it; that there was no privity between the other part owners and *C.*, and consequently that the action was not maintainable.

B b 4

Sic 3 *B* 9 *Ad.* 354.
East / *B* 2 *c.* 344.

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SIMS
against
BRITAIN.

East India Company, it was necessary that the receipt for the balance should be signed, not by the managing owner only, but by one or more of the other owners also. This had been done in the month of *April* 1829, and the balance of 2000*l.* and upwards received by the defendants on the joint receipt of *Gribble*, and of *Sims*, one of the plaintiffs; and the amount was placed by the defendants to *Gribble's* credit, in his account with the defendants as managing owner of the ship. The action was brought by the plaintiffs to recover the balance appearing due on that account, as money had and received to their use. The defendants sought to retain it, as there was a balance due from *Gribble* to them on the general account. Lord *Tenterden* was of opinion on the trial, that *Gribble* had been permitted by the owners to have the absolute dominion of the ship's earnings, and that there was no privity between the plaintiffs and the defendants; and therefore he directed a nonsuit.

Sir *James Scarlett*, in the early part of the term, moved for a new trial. The money received by the defendants belonged to all the part-owners. The defendants knew that, for they could not obtain payment from the *East India Company* until they procured the concurrence of *Sims*. Having received the money after that, they must be taken to have received it on account of all, and to be responsible to all.

Cur. adv. vult.

PARKE J. (a) during the term delivered the judgment of the Court.

(a) This case was moved before *Denman C. J.* took his seat on the bench.

This

This was an application to set aside a nonsuit, and for a new trial, made before my brothers *Taunton*, *Patteson*, and myself. We were desirous before we gave our opinion, to see Lord *Tenterden*'s note, and the documents given in evidence, and having done so, we entirely agree with the opinion expressed by him at the trial, that there was no privity between the plaintiffs and the defendants; and consequently that this action will not lie. (He then stated the facts of the case, and proceeded as follows.)

Although the concurrence of one of the plaintiffs was necessary in order to enable the defendants to receive the money from the *East India* Company, yet it was received by the *defendants* as the *agents of Gribble*, and they by such receipt became accountable to him for it. The transaction was, in effect, the same as if the plaintiffs and *Gribble* had themselves received the money, and it had been handed over to *Gribble*, who had then placed it in the defendants' hands on his own account; in other words, had made a *loan* of the money to them. The entry of the sum to *Gribble*'s credit on a separate account, is only a mode of keeping the accounts *between Gribble and the defendants*, for the sake of convenience: a plan which is not unfrequently adopted between a customer and his banker, the latter being nevertheless in all such cases responsible and indebted to the customer alone.

In this case the money appearing to the credit of *Gribble* was subject to his sole disposition, and payable by the defendants to his order only, and the case is just the same as if the defendants had been *Gribble*'s bankers, and by his direction, and for his convenience,
kept

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Sims
against
BRITAIN.

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against
BRITAIN.

kept a separate account of one part of his funds. If the other part-owners, the plaintiffs, had been unwilling to trust *Gribble* alone with the money, *they* should have raised a separate account in their own names, or as owners of this ship, with the defendants; and then they would have been responsible to them. That they have not done; and therefore they cannot treat the defendants as their debtors. They were debtors to *Gribble*, and are now responsible to his executors. There must therefore be no rule.

Rule refused.

Monday,
Nov. 26th.

LUCAS and Another *against* The LONDON DOCK Company.

cc. - 722

Goods consigned to *A.*, and warehoused at the *London Docks*, were claimed by *B.* The Dock Company required an indemnity of *A.*, the original consignee, before delivering them to him; *A.* refused, and

[N *July* 1830 forty-two casks of wine arrived at the *London Docks* from *Calcutta*, consigned to the plaintiffs, and were warehoused in their names. In *April* 1832 notices were severally given to the company by persons named *Masson* and *Lundie* that the wines had been shipped from *Madeira* for *Calcutta* and *New York* by certain parties respectively entitled thereto, and that the captain of the ship had fraudulently sold them at *Calcutta*, from

brought an action of trover, with counts for special damage, for the detention. On motion by the company for relief under the interpleader act, 1 & 2 *W. 4. c. 58.*, *B.*, upon due notice, not appearing, the Court held, that the claim of *B.* against the company was barred, but that *A.* ought not, by reason of the act, to be precluded from recovering for his special damage, if any.

The rule was made, that on the defendants undertaking to deliver up the wine, then, if *A.* should accept the same, the action should be discontinued on payment of costs by the defendants; but if *A.* should go on with the action, the count in trover should be struck out, and *A.* proceed for the special damage only.

whence

whence they had been shipped for *London*, consigned as above; and the company were desired, on behalf of the alleged owners, not to deliver the wines without the order of their agents. In *May* following a letter was sent to the company threatening an action by one of the parties interested, if the wines were delivered without such order. The company (acting under counsel's opinion) afterwards offered to give up the wines to the plaintiffs on receiving an indemnity. This the plaintiffs refused, and gave notice of action. The company, after some further communication with the parties, said they would deliver the wines to the plaintiffs; but the latter then answered that they had lost the sale, and could not take to the property. In this term the plaintiffs declared in trover for the wines, with counts alleging special damage. Sir *James Scarlett* in the course of the term obtained a rule calling on the plaintiffs to shew cause why all proceedings should not be stayed on the defendants' delivering up the wines to the plaintiffs on payment of the rates and charges due thereon, or undertaking to abide by such order as the Court might make in the matter; notice of the rule being given to *Masson* and *Lundie*. The affidavits in opposition to the rule stated, that the wines were bonâ fide consigned to the plaintiffs as agents, under a bill of lading, that they had made advances on them, and that they had no notice that the shipper was not the actual owner. *Masson* and *Lundie* made no answer to the application.

1832.

LUCAS
against
The LONDON
Dock
Company.

The Solicitor-General and *T. Clarkson* now shewed cause, and contended that the defendants were not, upon this state of facts, entitled to relief by the statute 1 & 2 *W. 4. c. 58.*, under which the rule was obtained :
that

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LUCAS
against
The LONDON
Dock
Company.

that the plaintiffs here were clearly entitled under the factors' act against all the world, and that the mere presence of an adverse title by parties who did not appear, ought not in any degree to interfere with their right.

Sir *James Scarlett* and *F. Pollock*, *contra*, urged that the case was one in which the defendants ought, upon the terms proposed, to be relieved from all liability; that the act 1 & 2 *W. 4. c. 58.* was not confined to cases which would be strictly the subject of a bill of interpleader (*a*), but was intended for the more general protection of companies like the present, and no ground was shewn for excluding the defendants from that benefit.

Per Curiam. Before the statute of 1 & 2 *W. 4.*, it was the constant practice in actions of this kind, where the defendant offered to deliver up the property, that if the plaintiff wished to proceed, such part of the declaration as was framed in trover merely, was struck out, and plaintiff left at liberty to proceed for any special damage. The same may be done here; the defendants will reap this benefit from the statute, that the claim of the third party, who does not appear, is barred; but the plaintiffs ought not to be precluded from recovering in respect of special damage, if they have sustained any (*b*). The rule may be drawn up according to the precedent in 1 *Tidd*, p. 545. 9th edit.

The rule was to the following effect:— That, upon the defendants thereby undertaking to deliver up the wine, if the plaintiffs should accept the same the action

(*a*) See *Johnson v. Atkinson*, 3 *Anstr.* 798.

(*b*) See *Fisher v. Prince*, 3 *Burn* 363.

should

should be discontinued on payment of costs by the defendants, to be taxed by the master ; but if the plaintiffs should choose to proceed in the action, the count in trover should be struck out, and the plaintiffs proceed for the special damage only.

1832.

LUCAS
against
The London
Dock
Company.

MEMORANDA.

IN the course of this term Sir *William Horne* was appointed Attorney-General, and *John Campbell*, Esq. one of his Majesty's counsel, was appointed Solicitor-General, to his Majesty, and received the honour of knighthood.

END OF MICHAELMAS TERM.

C A S E S

1833.

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Third Year of the Reign of WILLIAM IV.

CARVALHO and Others, Assignees of the Estate
and Effects of A. P. FORTUNATO, a Bank-
rupt, *against* BURN and Another.

A., who resided
at *Liverpool*,
was in the habit
of making con-
signments of
goods to *B.*,
his agent in
South America,
for sale, on the
faith of and

TROVER. Plea, not guilty. At the trial before
Parke J., at the *Lancaster Spring* assizes 1831, the
jury found a verdict for the plaintiff, with 2049*l.* da-
mages, subject to the opinion of this Court on the
following case: —

against which consignments, *A.* drew bills proportioned to their amount, to be paid by
the agent out of the proceeds; and the bills were negotiated by the indorsements of *C.*,
A.'s correspondent in *London*. Some of the bills so indorsed were refused acceptance by
the agent. *C.*, on receiving information that they had been so dishonored, requested that
A. would order his agent, in case he did not pay his, *A.*'s drafts, immediately to hand over
to *C.*'s agent *such property as he had of A.*'s, of an equivalent value to the bills *that should*
not be paid by him. *A.* agreed to do so, but became bankrupt before his order to transfer
the goods reached *South America*:

Held, that the bargain between *A.* and *C.* did not operate as a legal or equitable assign-
ment of the property in *A.*'s goods, held by *B.*, his agent, but that they remained the
property of *A.* at the time of his bankruptcy, and passed to his assignees.

A. P. Fortunato,

1 Bac. 635
7 Sim. 109.

A. P. Fortunato, in the year 1829 and for some time previously, was a merchant in *Liverpool*. He committed an act of bankruptcy on the 20th of *May* 1829, upon which a commission of bankruptcy was duly issued against him, bearing date the 23d of *June* 1829; and under which the plaintiffs were duly appointed assignees. The bankrupt, for some years before his bankruptcy, had been in the habit of making large consignments of cotton goods, belonging to himself, to one *Rego*, his agent at *Bahia* in *South America*, for sale there on his, the bankrupt's, account. The course of business was, and had been, for many years, for the bankrupt to consign goods to *Rego*, on the faith of, and against which consignments the bankrupt drew bills proportioned to the amount of those consignments, to be paid by *Rego* out of the proceeds. The bankrupt was in the habit of procuring the bills so drawn to be negotiated in *London* by the indorsement of the defendants, his correspondents in *London*, who were merchants, and who received for so doing the customary brokerage.

In the years 1828 and 1829, the bankrupt had made such consignments to *Rego* at *Bahia* by eight different vessels. Between the 29th of *November* 1828, and the 16th of *March* 1829 inclusive, the bankrupt drew and negotiated bills so drawn, and indorsed as above stated, to the amount of 3800*l.*, and received the value from the defendants. All those bills were dishonored by *Rego*, and were afterwards accepted and taken up by *Vogeler*, the defendants' agent at *Bahia*, for their honor. Goods had been consigned by the bankrupt to *Rego* at *Bahia* to an amount which authorized the bankrupt to draw to the extent of 3800*l.*,
and

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and insurances were effected on such goods by the defendants under the directions of the bankrupt. The bankrupt received due notice of the dishonor of all the bills.

On the 23d of *March* 1829, the defendants received notice of the dishonor of the bills drawn in *November*, and, on the same day, wrote to the bankrupt the letter following: — “ It is with the greatest concern we have to inform you, that we have this day received advices from *Bahia*, that Mr. *A. D. C. Rego* had refused to accept your draft on him on the 29th of *November* for 500*l.*, which intelligence, as you may well conceive, has caused us no small degree of surprise and mortification, and particularly as we cannot but be apprehensive that the same unlooked for fate may likewise await your subsequent drafts on him. We have, therefore, most earnestly to request that you will not lose one moment in putting Mr. *Rego* in such a situation as to enable him to pay your drafts; and that you will also resort to the necessary means to furnish us with funds sufficient to reimburse us for the amount of any of your drafts that may come back to us protested for non-payment, whenever you are aware of such being the case.” On the 27th of *March* 1829, the defendants received from the bankrupt the following letter, dated the 25th of *March* 1829: — “ The subject of your favour of the 23d grieves me most bitterly, especially at the present time, when I am quite unprepared to act as it is both my wish and my duty; therefore I request you to send back the protested drafts to your agent in *Bahia* to have them accepted by Mr. *Rego*, allowing him an extension of the time to liquidate, as, by this mode, you only will incur the inconvenience of delay, and I will give instructions to Mr. *Rego* to settle

settle with your agent as the demands arise from the said bills.”

On the 4th of *April* 1829, the defendants wrote to the bankrupt the letter following: — “ We are duly favoured with your letter of the 23d ultimo, and in reply thereto, we beg to observe, that the bills Mr. *Rego* refused to accept have not yet been returned to us, as it would have been quite irregular to have returned them merely for want of acceptance; but in case of non-payment on the days on which they became due, they are sure to be sent back with the necessary protests; and it is quite impossible for us or our agents to grant any extension of time, as we are not the holders of the bills, with whom alone rests the power of granting such accommodation. As indorsers of the bills, they will of course come back upon us first; however, we most fervently hope that such an unpleasant event will not take place, and that Mr. *Rego* will pay them. We have too high an opinion of your honor to suppose for a moment that you would have drawn these bills without having the means necessary for their discharge in the hands of Mr. *Rego*, and therefore we most earnestly request that you will write to Mr. *Rego* by the first vessel with orders *that in case he does not pay your drafts, he will immediately hand over such property as he may have of yours, of an equivalent value to the bills not paid by him, to our agent Mr. Vogeler of Bahia, whom we have requested to pay the bills for our house.*”

On the 11th of *April* 1829 the defendants received from the bankrupt the letter following, dated the 9th: — “ Agreeably to your injunctions, I will write to Mr. *Rego*, per brig *Wavertree*, to sail on the 12th of this month, directing him to hand over to Mr. *Vogeler* pro-

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perty of mine in his hands to cover the amount of bills that eventually may not be paid; I say eventually, because I do still hope that some of them will be accepted; for the cause of Mr. Rego not having done so, was the impossibility of realizing and collecting debts. I beg to assure you that I will do all that is due of me to secure your property, and you shall not be sufferers in the least by this unfortunate transaction beyond some delay." On the 11th of *April* 1829, the bankrupt wrote to the said *Rego* at *Bahia* the letter following:—"I have engaged and made promise to *Burn* and Co. that you should pass into the hands of their agent in your city, Mr. *Vogeler*, all the property which might exist in your hands for my account. You will arrange with that gentleman the mode in which this order may be carried into effect, with this understanding, that it is essential that the whole be done under perfect secrecy, for which I shall consider myself as very much obliged by you. It appears to me that the best plan would be to pay him the liquidated amounts as fast as the same are received." This letter reached *Rego* in *June* 1829, and he on the 11th of that month wrote to the defendants as follows:—"The reason which obliged me to refuse acceptance to the bills which Mr. *Fortunato* drew upon me on the 29th of *November* last and subsequent months, was the stagnation of a great part of the goods which he consigned to me, and of which there still exists a great part in my possession, which I will deliver to Mr. *Vogeler* in consequence of the order to do so which I have received from him (Mr. *Fortunato*), which delivery I intend effecting by the end of the current month." On the 15th of *July* 1829, *Rego* wrote and sent to the defendants

defendants a letter containing the following statement :
 —“ The present has for its sole object the informing
 you that on the 30th ultimo I placed at the disposal of
 Mr. *Vogeler* 3625*l.* 2*d.* in goods belonging to Mr.
Fortunato.” On the 30th of *June* 1829, *Rego* did in
 fact hand over to the agent of the defendants at *Bahia*
 the goods mentioned in the declaration, being part of
 the goods consigned for sale by the bankrupt to *Rego*
 as before mentioned, and the agent afterwards, and
 before the commencement of this action, sold the same
 by the direction of, and for the defendants, and paid
 them the proceeds.

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 against
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The question for the opinion of the Court was,
 whether the plaintiffs were entitled to recover the value
 of the goods sold by the agent of the defendants? The
 case was argued in last *Trinity* term.

Crompton for the plaintiffs. The assignees of *Fortunato*
 are entitled to recover the value of the goods which were
 transferred by his agent to the defendants after he had
 committed an act of bankruptcy. The onus of shewing
 that they do not vest in the assignees lies on the de-
 fendants, to whom they were transferred after an act
 of bankruptcy; *primâ facie* they passed by the assign-
 ment to the plaintiffs. It will be said that there was an
 equitable transfer of the property to the defendants be-
 fore the bankruptcy, and that the letters are evidence of
 such transfer; they, however, contain nothing more
 than a promise by the bankrupt to pawn, not any spe-
 cific property, but some undefined portion of goods to
 be afterwards selected. Now it has been held in equity,
 that a general covenant to settle lands on a wife of the
 value of 60*l.* per annum, without mentioning any lands

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in certain, does not create a specific lien, *Freemoult v. Dedire* (a). So where *A.*, having borrowed 300*l.* of *J. L.*, by his note of hand promised to pay to *J. L.* the sum on demand, and to give him a security by mortgage of lands for the same when required, and *A.*, at the time, had no lands nor any real estate, except an advowson and some tithes, and died about a month afterwards; *J. L.* insisted that this debt was by the said note made a charge on the only real estate which *A.* had the power of charging, viz. the advowson and tithes: but it was held this case could not be distinguished from *Freemoult v. Dedire*, and that *J. L.* was only a simple contract creditor, *Williams v. Lucas* (b). In the letter of the 11th of *April*, containing the order to *Rego* to transfer the goods, the bankrupt suggests a plan which, if carried into effect before the bankruptcy, might have barred the rights of the assignees; but it did not reach *Rego* till after the bankruptcy, and never having been communicated to the defendants, cannot constitute any contract between them and the bankrupt. That contract is contained in the letters of the 4th and 9th of *April*; but in them there is nothing like an assignment of any specific goods, as in *Lempriere v. Pasley* (c). It is a contract executory to pawn some property, and the amount is contingent on the amount of bills unpaid, and of goods in *Rego's* hands, at the time when the order should arrive. Even if it were a contract to sell a quantity of chattels out of others, no property would have passed by it to the defendant till they were selected and separated from the rest. The rule is the same as to this, both at law and in equity.

(a) 1 *Peere W.* 429.(b) *Ibid.* 430. note (1.)(c) 2 *T. R.* 485.

It

It would be very dangerous to say that a trader could, by such a contract as is alleged here, mortgage property without any transfer of possession. Assuming that there had been a contract to pawn a specific chattel, in the hands of an agent of the pawnor, it would be very questionable whether that property would pass by it. If the chattel remained in the hands of the party himself, it would clearly pass to his assignees, as being in his apparent possession. If they were in the hands of an agent, that party would continue to be the agent of the pawnor till he received notice and consented to become the agent of the pawnee; till such consent was given, the goods would be considered in the possession of the pawnor, *Hunt v. Mortimer* (a), *Vacher v. Cocks* (b). In *Lempriere v. Pasley* (c) there was an assignment of specific goods at sea, before the bankruptcy, though the bill of lading was not delivered over till after. But if a contract be sufficient where a chattel is in the hands of the agent, what distance would suffice? Would it transfer the property if the principal lived in *London* and the agent in *Yorkshire*? But at all events there is no contract as to any specific property.

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 ———
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Starkie contra. The bankrupt would have been bound by the order given by him to *Rego*, and the consequent delivery of the property to the defendants. Now it is a general rule, that the assignees are bound by any contract which would affect the bankrupt, except in cases of reputed ownership and fraudulent preference. If any legal or equitable interest in the goods in question was given to the defendants, the property in them would

(a) 10 B. & C. 44.

(b) 1 B. & Ad. 145.

(c) 2 T. R. 485.

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not pass by the assignment to the assignees, for they take only what the bankrupt could assign. Now here the defendants took at least an equitable interest in the goods. It is clearly established, that where under the circumstances an actual and immediate delivery is impossible, an agreement to deliver is sufficient to pass the property; as in the case of a ship at sea, or goods at a distance in the hands of a third person; otherwise the right would depend on the mere local situation of the property; and a party, although solvent, would be unable to transfer. But in *Lempriere v. Pasley* (a), an assignment of goods at sea, as a collateral security for a debt, and a subsequent indorsement of a bill of lading, were held good as against the assignees of the assignor, who committed an act of bankruptcy after the assignment of the goods and before the indorsement of the bill of lading. In *Bailey v. Culverwell* (b), the brokers of B. sold goods in their possession to C., taking in payment a bill accepted by D., and retaining the goods on C.'s account, with instructions to sell, if at a profit; before the bill was due, D. becoming bankrupt, the brokers of their own accord applied to C. for security, who authorized them to sell the goods and apply the proceeds in payment of the bill; but before they were sold, C. also became bankrupt: it was held that C.'s assignees could not maintain trover against the brokers or against B. for the goods, which after the order from C. to the brokers to sell and apply the proceeds, remained in the brokers' hands subject to that charge, although the brokers in requiring such security acted without instructions from B., he having by his conduct subse-

(a) 2 T. R. 485.

(b) 8 B. & C. 449.

quently

quently ratified their acts, and the brokers being entitled to act for their employer's benefit.

As to the objection that there was no contract for the delivery of specific goods, they are specified by circumstances. The bills were drawn on the faith of, and against, specific consignments, in proportion to the amount of each, and were to be paid out of the proceeds. The defendants did not know what had been sold. The order given by the bankrupt to his agent corresponded with the request in the defendants' letter of the 9th to transfer all the property which might exist in his hands. The agent of the bankrupt was bound to hold in his hands goods to the amount necessary to cover the bills, especially after the order and agreement by him to act on it. He was then in the nature of a trustee for the defendants. The letters, therefore, must be taken to apply to the goods of the value of 3800*l.* which were in the hands of *Rego* at the time. In *Row v. Dawson (a)*, *A.* borrowed money of *B.* and gave him a draft upon a fund due to *A.* out of the Exchequer, and became bankrupt; and it was held by Lord *Hardwicke* that that was an equitable assignment thereof to *B.* for valuable consideration, and that it should prevail against the bankrupt's assignees. In *Yeates v. Groves (b)*, the holder of a note gave it up on receiving an order for payment of the amount out of the purchase-money of a house; the purchaser agreed to give notice to attend when the deeds and money were ready, and the holder did so attend, but before the business was over the drawer was arrested, and soon after became bankrupt. The Lord Chancellor held, that the order operated

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(a) 1 *Ves. sen.* 331.(b) 1 *Ves. jun.* 280.

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as a transfer of the money. The defendants here had an equitable title to be paid out of the proceeds of particular property, before the act of bankruptcy, and if the general assignment has relation to the act of bankruptcy so as avoid all mesne assignments, why should not the delivery in this case have relation to the time of the agreement and the order given by the bankrupt to *Rego*?

Cur. adv. vult.

LITTLEDALE J. now delivered the judgment of the Court. This is a special case which was argued in *Trinity* term last before the late Lord *Tenterden*, my Brothers *Parke*, *Taunton*, and myself. The action was in trover, to recover the value of a quantity of cotton goods, which came to the possession of the defendants on the 30th of *June* 1829, in the *Brazils*, and were afterwards sold by them. On the 20th of *May*, an act of bankruptcy was committed by the bankrupt *Fortunato*, and a commission issued on the 23d of *June*, under which the plaintiffs were appointed assignees. The goods in question were part of some consignments made by the bankrupt at different times to a person of the name of *Rego* at *Bahia*; against these consignments the bankrupt drew on *Rego* bills of exchange, which were negotiated by the defendants indorsing them. No goods appear to have been specifically appropriated, by the bankrupt's directions, to the payment of any particular bill; but the bills were drawn generally, though proportioned in amount in a certain degree to the value of the consignments. In *March* 1829, information was received by the defendants in *London*, that some of the drafts were refused acceptance, in consequence of which
they

they became liable on their indorsement, and being apprehensive that others would meet with the same fate, they called upon the bankrupt to make provision for their re-imbusement; a correspondence followed, and the question in this case turns mainly upon its meaning and effect.

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 9 Oct 8 -295
 12 Oct. 543

It is quite clear that the assignment vested in the assignees all the personal estate and effects in which the bankrupt was, at the time of the act of bankruptcy, *beneficially* interested (with the statutory exceptions, 6 G. 4. c. 16. s. 81, 82. 86. 112.); but as the object of the assignment of the bankrupt's property is, that it may be applied to the payment of his debts, it is equally clear that nothing passed by it which the bankrupt then held in trust for others, or in which he had only a mere legal interest, *Scott v. Surman* (a), *Winch v. Keeley* (b), *Carpenter v. Marnel* (c), *Gladstone v. Hadwen* (d); but if, at the time of the act of bankruptcy, the bankrupt possessed a possibility of interest, from which a benefit to his creditors might result (e), if he had the legal interest in any property, and it was uncertain whether he would hold any part of that property, or if any, what part, as a trustee for others, the whole would pass by the assignment: it could not remain in the bankrupt subject to be transferred on a future contingency: and if it did pass to the assignees, it could not be divested out of them in whole or in part by the happening of events subsequent to the act of bankruptcy, which might make them hold the whole, or some specific part as trustees merely; for there is no provision in the statute which

(a) *Willes*, 400.

(b) 1 T. R. 619.

(c) 3 B. & P. 40.

(d) 1 M. & S. 517.

(e) Per Lord *Alvanley*, 3 B. & P. 41.

takes

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takes a right out of the assignees, that has once been vested in them.

The whole question then is, not whether the plaintiffs were or were not trustees for the defendants for the whole or part of those goods *at the time of the action brought*; but whether the property in them, or any part of them, vested in the plaintiffs by virtue of the assignment. To decide this, we must refer to the terms of the bargain between the bankrupt and defendants contained in the two important letters of the 4th and 9th of *April*.

The material parts of that of the 4th of *April* are as follows: —“ As indorsers of the bills, they will, of course, come back upon us first; however, we most fervently hope that such an unpleasant event will not take place, and that Mr. *Rego* will pay them: we have too high an opinion of your honour to suppose for a moment that you would have drawn these bills without having the means necessary for their discharge in the hands of Mr. *Rego*, and therefore we most earnestly request that you will write to Mr. *Rego* by the first vessel, with orders that in case he does not pay your drafts he will immediately hand over such property as he may have of yours, of an equivalent value to the bills not paid by him, to our agent, Mr. *Vogeler*, of *Bahia*, whom we have requested to pay the bills for our house,” &c. The bankrupt answers on the 9th of *April*, “ Agreeably to your injunctions, I will write to Mr. *A. C. Rego*, per brig *Wavertree*, to sail on the 12th of this month, directing him to hand over to Mr. *Vogeler* property of mine in his hands to cover the amount of bills that eventually may not be paid. I say eventually, because I do still hope that some of them will be accepted; for the cause of Mr. *Rego* not having done so

was

was the impossibility of realizing and collecting debts. I beg to assure you that I will do all that is due of me to secure your property, and you shall not be sufferers in the least by this unfortunate transaction, beyond some delay."

The proposal by the defendants is, that if *Rego* does not pay the bankrupt's drafts, he, the bankrupt, should hand over to the defendant's agents so much property in his hands as may be of equivalent amount to the drafts unpaid. The letter of the 9th of *April* is nothing more than an assent to the defendants' proposal. It does not extend or vary it, and constitutes a binding agreement between the parties to the same effect.

In this agreement the event upon which the property is to be transferred is uncertain, and the amount to be transferred is also uncertain. If *Rego* paid the bills, no goods would be in that case subject to delivery to the defendants; if he did not, and had sold the goods previous to the communication from the parties being received in the *Brazils*, no goods would be capable of being delivered; if the goods existed at that time, the value of the goods to be delivered, and the specific goods, would be still uncertain and unascertained.

It is therefore quite impossible to contend that the legal property in any part of the goods then in *Rego's* hands passed by this bargain to the defendants; and it seems to be equally impossible to say that the contract operated as an equitable assignment of the whole or of any specific part *at that time* or *before the act of bankruptcy*; for it is clear that the parties to it do not consider that the whole or any specific part is then to be held by the bankrupt for the defendants, or is absolutely, and, at all events, to be assigned to the defendants at
any

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any future time. Until certain contingencies happen, and until something more is ascertained and done, the equitable as well as the legal interest must be in the bankrupt; and, if so, it must pass to his assignees.

It is not necessary to decide, whether the agreement gave an irrevocable, though contingent, interest in the goods, and whether the assignees, in the events which have since happened, are or are not trustees for the defendants, and bound to repay out of the proceeds of the goods in question the amount which they have paid. The defendants may have an equitable right to be paid out of the goods or their proceeds; but the question, whether they have such a right, and the mode of enforcing it, belongs to a court of equity.

We have passed over the letter of the 11th of *April* without notice, because that letter was not communicated to the defendants, and does not form a part of the contract between them and the bankrupt. Taken alone, it is a mere countermandable authority, which was countermanded by the bankruptcy.

We therefore think, that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

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The Mayor, Aldermen, and Burgesses of
MACCLESFIELD *against* PEDLEY.

ACTION on the case for an injury to the plaintiffs' market in the borough of *Macclesfield*. The declaration alleged, that the plaintiffs were "lawfully possessed of" a certain market, and that butchers and other persons selling their flesh-meat on the market days in that town, ought not to sell it in private houses, but in the open public market on the plaintiffs' stalls, or on stalls placed there by their consent, paying stallage; and the breach was, that the defendant sold meat on market days in a private house in the town. Plea, not guilty. At the trial before *Bolland B.*, at the *Chester* Spring assizes 1832, the plaintiffs produced, first, a charter, dated the 29th of *May* in the forty-fifth year of *Henry III.*, whereby *Edward* Earl of *Chester* granted and confirmed to the burgesses of *Macclesfield*, "that the town should be a free borough, and that the burgesses should have a merchant's guild, and that they should be quit of toll, passage, pontage, stallage, and other customs;" secondly, a charter of the 18 *Car. 2.*, reciting, "that the burgesses and inhabitants of that borough had used and enjoyed divers liberties, privileges, jurisdictions, courts, franchises, customs, powers, authorities, immunities, pre-eminences, lands, tenements, possessions, and other hereditaments; and had been endued with the same, as well by force of divers charters, letters patent, grants, and confirmations

Quære, if the grantee of a newly created market can, by virtue of such grant merely, maintain an action for disturbance of franchise, against a person selling marketable articles in his own shop, within the franchise, but not within the limits of the market place, on the market day.

But a claim by immemorial custom to exclude others from selling such commodities on the market day, except in the market place, is valid in law.

And where a market for meat, &c. was proved to have been in existence in the reign of *James the First*, proof that the grantees of the market had for the last hundred years appointed market-lookers, that no

butchers' shops had existed out of the market place until 1810, and that the shops then set up were objected to by the grantees, was held to be sufficient evidence of such immemorial right.

by *J. B. Ac. 565.*

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against
PROLET.**

by King *James* the First, and by divers other kings and queens of *England*, as by reason and pretext of divers ancient and laudable customs and prescriptions in the same borough during the whole time aforesaid used and approved. It then ordained, granted, ratified, and confirmed to the mayor, aldermen, and burgesses, and their successors, the incorporation and body corporate aforesaid, and all and singular the liberties, free customs, franchises, immunities, exemptions, acquittances and jurisdictions of the same body corporate; and such lands, tenements, *markets*, fairs, tolls, customs, liberties, privileges, franchises, immunities, powers, authorities, acquittances, jurisdictions, profits, advantages, emoluments, and hereditaments whatsoever, which the mayor, aldermen, and burgesses, or their predecessors, had lawfully had, held, used or enjoyed, or ought to have, hold, &c. by reason or pretext of any charters or letters patent by King *James* the First, or by any kings or queens of *England*, theretofore made, granted, &c., or by any other lawful mode, right, or custom, use, prescription, or title theretofore used or enjoyed; the same to be had, held, &c. by them in as ample manner as before. The plaintiffs further proved, that from the year 1734 the corporation had appointed market-lookers, whose duty it was to go through the market on market days, and inspect the flesh-meat, and seize it if unwholesome; and that officers so appointed had from time to time seized unwholesome meat. The market days were on *Tuesdays* and *Saturdays*. There were eighty butchers' stalls or shambles in the market place: but before 1810 there were no butchers' shops in the town out of the market place, and then they were objected to by the corporation.

It

It was contended, that on this case the plaintiffs ought to be nonsuited; but the learned Judge was of opinion, that there was sufficient evidence that the market was an *ancient* market for meat, and he thought the appointment of market lookers by the corporation, and the non-existence of butchers' shops before 1810 were evidence to go to the jury, that the exclusive right contended for existed. The defendant then called some witnesses, who stated that before 1810 there were butchers' shops out of the market place where meat was sold on market days. The jury having found for the plaintiffs, a rule nisi was obtained for a new trial, on the ground, first, that the learned Judge had misdirected the jury, by stating that the right to exclude individuals from selling in private shops resulted from the right to the franchise of a market, unless the defendant could shew the contrary, whereas, by law, such right of exclusion could only exist by immemorial custom; and, secondly, that the question, whether there was any such immemorial custom was not left to the jury. The learned Judge, in his report, stated, that he had not stated to the jury, that the plaintiffs had the right contended for as incident to the franchise of the market, but that he treated the right as one which could exist only by virtue of immemorial custom, and left it to the jury, on the evidence, to say whether such exclusive right existed.

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The Mayor of
MACCLESFIELD
against
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Jervis and *Lloyd*, in *Trinity* term, shewed cause (a). The Judge having left it to the jury on the evidence to find whether there was an immemorial right in the corporation to prevent persons from selling out of the mar-

(a) Before Lord *Tenterden* C. J., *Littledale*, *Parke*, and *Taunton* Js.

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—
The Mayor of
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ket on market days, the only question now is, whether the verdict was against evidence? Now, first, the grantee of an ancient, though not an immemorial market, may have the right of preventing others from selling on the market days within the limits of his franchise. The king, when he grants the franchise of a market within a given district, may, provided he does not interfere with vested rights, prevent other persons from selling within that district on market days, and where the right is proved to have been exercised from early times, it must be presumed to have been part of the grant, *Moseley v. Walker* (b). Here the evidence, and especially the fact that there were no butchers' shops out of the market place before 1810, shews that the right did exist.

But, secondly, the grant of a market necessarily confers on the grantee the right of excluding all others from selling on market days in houses within the limits of his franchise. In the *Prior of Dunstable's case* (b), where the action was similar to the present, it is laid down, that "if the prior had a market within the town, and is lord of the town, you cannot prescribe to sell meat in your own house on the market day; for the market cannot be but in an open place, and the prior then would lose the benefit of his market, if they might sell their wares in their houses; and also where he has the correction of the market, and to see if the things which shall be sold are lawful and vendible, which cannot be tried by his officer if it be not in open market, and also he would lose his toll of the things sold."

Campbell, Temple, and Tyrwhitt contra. There was no evidence to shew that the market was immemorial,

(a) 7 B. & C. 40.

(b) Cited in *The City of London's case*, 8 Co. 127.

and

and very slight evidence that the corporation had existed from time immemorial. The charter of the 45 *Hen. 3.* does not mention a market. The charter of *Car. 2.*, reciting that of *Jac. 1.*, does mention a market for the first time. It may be assumed, therefore, that the market commenced within the time of legal memory; and the king cannot make a grant of a market within time of memory, so as to prevent persons from dealing in merchantable commodities in their own houses, though such a right may exist if it be immemorial. That appears to have been the opinion of *Holroyd J.* in *Mosley v. Walker (a)*. [*Littledale J.* In *Prince v. Lewis (b)* it was taken for granted that the market was not immemorial, but no doubt was made that the action would have lain if the lessee had not encumbered the space.] It was not necessary there to take the present objection. [*Littledale J.* In *Comyns's Digest, Market, F. 2.*, it is said that the owner of a house next to a fair or market cannot open his shop for selling in a market without payment of stallage; for if he takes the benefit of the market he ought to pay the duties there, and 2 *Roll. Abr.* 123. l. 30. is cited.] The *Prior of Dunstable's case (c)* is the only authority to shew that the right of exclusion is incident to the general grant of a market; but there the declaration charged that the defendant sold in his own house *secretly*, and the judgment went, in a great measure, on that; and the general point was not decided in *Mosley v. Walker (a)*. The jury were not justified by the evidence in finding that there were no shops, out of the market-place, where meat was

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(a) 7 *B. & C.* 40.(b) 5 *B. & C.* 363.(c) Cited in 8 *Co.* 127.

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sold on market days before the time of legal memory. If the charter of *Jac. 1.* had been produced, it might have thereby appeared whether or not the market was then granted for the first time. At all events, it might have been shewn by the charter itself, that the exclusive right now claimed was thereby granted. No such grant appeared. There is no ground for assuming that the right is generally incident to the grant of a market; and there was no evidence of a market before *Jac. 1.*; if so, it commenced within the time of legal memory, and consequently there could not be an immemorial custom to exclude persons from selling in their own shops.

Cur. adv. vult.

LITTLEDALE J., in the course of this term, delivered the judgment of the Court.

This case came before the Court on a motion for a new trial, against which cause was shewn in *Trinity* term. (He then stated the substance of the declaration.)

The cause was tried before my Brother *Bolland*, at the *Chester* Spring assizes 1832, when a verdict was found for the plaintiffs. On the motion for a new trial, it was objected that the learned Judge had misdirected the jury, by stating that the right to exclude individuals from selling in private shops resulted from the right to the franchise of a market, unless the defendant could prove a custom to the contrary, whereas, by law, such right of exclusion could only exist by immemorial custom; and that the learned Judge had not left to the jury the question, whether there was such an immemorial custom with respect to this market.

Upon considering the report, and after conferring with the learned Judge, we are of opinion that the objections

jections urged in support of the motion for a new trial cannot be sustained. The learned Judge never stated that the plaintiffs had the right contended for as incident to the franchise of the market. He treated this right as one which could exist only by virtue of immemorial usage, and that question, substantially, was left to the jury.

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There is no doubt that there was sufficient evidence to prove such a custom; for it clearly appeared upon the testimony of several witnesses, that no butcher's shop existed in the town of *Macclesfield* until of late years, and when these shops were first opened, the plaintiffs objected to them.

It was not material, in support of the custom contended for, to prove that this was a corporation by prescription: the question was, whether this was an immemorial market, and whether the custom existed from time immemorial, *for the owner of the market* to prevent private individuals from selling in shops out of the market; if it was so, and such custom existed, the market might have come into the hands of the plaintiffs, in modern times, by a grant from the crown or a subject, and the plaintiffs would have a right to enforce the custom.

In this view of the case, it is unnecessary to give any opinion whether the grantee of a newly created market could bring an action for the disturbance of his franchise against a person who did no more than sell, himself, in his own shop, not within the limits of the market-place, marketable articles on the market days. It may, however, be observed, that no case has decided that this act, simply, is an injury to the market in point of law. But it is equally clear, on the other hand, that a custom

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to exclude all others from selling such commodities on the market day, except in the market, is valid in law. The like custom was supported in the case of the *Manchester Market, Mosley v. Walker* (a), which much resembles the present case. The abbot of *Westminster* had formerly a similar privilege by custom, (as appears from the *Gravesend* case (b),) which was sold to the city of *London*, and many analogous usages are to be found in the books, and exist in different places. Indeed, the validity of such a custom, if established, was not disputed on the argument. The rule must therefore be discharged.

Rule discharged.

(a) 7 B. & C. 40.

(b) 2 Brownl. 179.

Saturday,
January 12th.

CLARKE and Others *against* FELL and Another,
Assignees of MOTT, a Bankrupt.

A tradesman undertook to do work upon an article delivered to him, for a person to whom he was indebted, and it was agreed that the work should be paid for in ready money. He afterwards became bankrupt: Held, that the act 6 G. 4. c. 16. s. 50. (which provides for the setting off of cross demands where there has been mutual credit between the bankrupt and a party claiming on his estate), did not, in this case, render the assignees liable in trover for refusing to deliver such article to the creditor on his offering to set off the price of the work against his own demand.

TROVER for a stanhope. At the trial before *Denman* C. J., at the sittings in *London* after *Michaelmas* term 1832, it appeared that the plaintiffs, in *April* 1831, sent the carriage to *Mott* to be repaired. They were, at that time, holders of a bill accepted by him for 24*l.*, payable on the 19th of *June* 1831. *Mott* afterwards became bankrupt, and the stanhope passed into the hands of his assignees. The repairs were done, and the charge for them was 20*l.* The plaintiffs demanded the stanhope of the assignees, and proposed to strike off the 20*l.*

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13*ac*. 650.

from the bill, which they still held, but the assignees refused to deliver it without actual payment. The case made on their part was, that, by agreement between the plaintiffs and *Mott*, the repairs were to be paid for in ready money; and that they were completed after the bankruptcy. The plaintiffs disputed these facts, and contended that the two sums of 24*l.* and 20*l.* were mutual debts at the time of the bankruptcy, and ought to be set against each other according to 6 G. 4. c. 16. s. 50. *Denman* C. J. directed the jury to find for the defendants, if they should be of opinion that the agreement was for ready money, or that the repairs were completed after the bankruptcy: and the jury found for the defendants on both points.

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Cleasby now moved for a rule to shew cause why there should not be a new trial, on the ground of misdirection. Even admitting the facts to have been as found by the jury, this was a case of mutual credit within 6 G. 4. c. 16. s. 50.; and the effect of that section is to extinguish the debt on each side, except as to the balance, which may then be considered as a new debt: the lien, which attached to one of the original debts, is destroyed with the debt itself. A mutual credit, within the act, exists where there is a debt, or something that will necessarily end in a debt, from each party to the other, *Rose v. Sims* (a). Here the bankrupt was indebted to the plaintiffs on his acceptance, and had the stanhope in his possession for repairs, which must necessarily have created a debt from the plaintiffs to him. The definition of a mutual credit in *Rose v. Sims* (a) agrees with the

(a) 1 B. & Ad. 521.

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construction before put upon that term, in cases under the statute 5 G. 2. c. 30. s. 28., *French v. Fenn* (a), *Olive v. Smith* (b). In *Rose v. Hart* (c), where the doctrine was in some degree limited, Gibbs C. J. nevertheless lays it down, that by mutual credits are meant such transactions as must, from their nature, terminate in debts. The clause there in question, in 5 G. 2. c. 30., does not materially differ from 6 G. 4. c. 16. s. 50., except that in the latter, it is said, that one debt *or demand* may be set against another; in the former the word "debt" only is used. As to the stipulation for ready money, the only effect of that was to make the sum due as soon as the repairs were finished: it does not affect the question of mutual credit: and the plaintiffs did, when the repairs were finished, offer payment by striking off the 20*l.* from the amount of the bill of exchange. Nor is it material that the amount to become due for the repairs was not ascertained at the time of the bankruptcy, the work not being then finished. The assignees must either repudiate the contract or affirm it. In the former case, they are without defence to this action; in the latter, as was held by Lord Kenyon in *Smith v. Hodson* (d), they must adopt the transaction with all its consequences, and subject to any defence by the opposite parties which they might have made to an action by the bankrupt himself: those parties, therefore, may set off the debt owing to them by the bankrupt, against the claim of the assignees. The transaction was inchoate before the bankruptcy: the assignees take it up, subject to the rule of mutual credit, which would have attached if the work had been completed by the bankrupt.

(a) *Cooke's Bankrupt Law*, 65. 8th ed.(b) 5 *Taunt.* 56.(c) 8 *Taunt.* 499.(d) 4 *T. R.* 217.

LITTLEDALE J. I think, under the circumstances of this case, there was no mutual credit of a nature to exclude the lien insisted upon by the defendants. If there had not been a contract to pay ready money, I should have been of a different opinion; for, although in that case there would still have been a lien on the carriage for the work done by the bankrupt, yet, as the bankrupt was also indebted to the plaintiffs, the question would have been on which side the balance lay, and that was in favour of the plaintiffs. But the agreement to pay ready money makes all the difference: the plaintiffs could not have insisted on a delivery of the stanhope by the bankrupt until the sum due for repairs had been paid by them in hard cash; if they had brought trover, the defence would have been, that they had not paid ready money for the repairs; and it would have been no answer to say that more was due to them from the bankrupt. If, indeed, the defendants had delivered the stanhope without insisting on the agreement for ready money, and afterwards brought an action, the set-off on the other side would have been let in, *Cornforth v. Rivett (a)*. Since, then, the plaintiffs, before they could have insisted upon the delivery of the stanhope, were bound to pay for the repairs, and the bankrupt might, on that ground, have defended an action of trover against them, the assignees, in adopting his contract, are entitled to the same benefit. The other point, therefore, as to the consequence of the work being completed after the bankruptcy, does not arise, though it might be argued from the case of *Trewhella v. Rowe (b)*, that the assignees, under these circumstances, might be considered as

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(a) 2 M. & S. 510.

(b) 11 East, 435.

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having taken upon themselves the fulfilment of a contract made before their title accrued, between the bankrupt and the plaintiffs: and that if the assignees so adopted it, they must be taken to have done so on the original terms. But it is unnecessary to consider this point. There will be no rule.

TAUNTON J. I think there was no misdirection in this case. As to one point, which was mentioned incidentally, I am of opinion, that the offer by the plaintiffs to deduct the charge for repairs from the amount due on the bill was different from an offer of ready money; though if there had been a tender of ready money, the subsequent detaining of the carriage would have been a wrongful conversion. Then as to the more general question. For some purposes there was a mutual credit in this case; if the plaintiffs had gone before the commissioners to prove their demand on the bill, there was so far a mutual credit that the assignees might have said, "There is so much due to the estate for repairs; the commissioners must state the exact balance, and allow that and no more to be proved." And this is for the benefit of the party trusting the bankrupt. But no such proceeding took place: if it had, the right to detain would have been gone, because the assignees would, in this way, have received payment of their demand. The question here, therefore, is, whether the credit was such as, on the bankruptcy of *Mott*, annulled his bargain with the plaintiffs; that bargain being, in effect, that unless he was paid in ready money, he should be at liberty to detain the carriage. I think the bankruptcy did not annul that bargain, nor deprive the bankrupt's estate of the benefit of that lien. There was
no

no payment, for the offer to allow a set-off was not equivalent to one; and the mutual credit was not of such a nature as to destroy the lien. As to *Rose v. Hart* (a), all that was decided in that case was, that the defendant could not, by virtue of a supposed mutual credit, detain the goods of a party who had become bankrupt for a general balance. Here the claim is to a lien on the particular article for the work done upon it.

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PATTESON J. I am of the same opinion; and I ground it entirely on the finding of the jury as to the agreement for ready money. Suppose there had been no bankruptcy; before the plaintiffs could have obtained the stanhope back, they must have paid the 20*l.*, notwithstanding their cross demand, though, according to *Cornforth v. Rivett* (b), if the bankrupt had delivered up the stanhope, the plaintiffs might have set off their cross demand in an action for the amount due. Then if the plaintiffs could not have set off the debt due to them as against the claim of *Mott* to be paid ready money pursuant to the agreement; the question is, whether they can, in like manner, avail themselves of that claim as against his estate, under the clause of mutual credit in the bankrupt act? I admit that the law of mutual credit under the bankrupt act goes farther than the ordinary law of set-off: *Rose v. Hart* (a), *Buchanan v. Findlay* (c), and *Rose v. Sims* (d) shew this: and I agree with Mr. *Cleasby* that there is a mutual credit within the act, where a debt, or that which will terminate in a debt, exists on each side; but the question in this case is, whether the bankruptcy of one party does away with an express contract

(a) 8 *Trunt.* 499.(b) 2 *M. & S.* 510.(c) 9 *B. & C.* 738.(d) 1 *B. & Ad.* 521.

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establishing a lien for payment of a particular debt. I find no case which decides that it can; and I think there is no ground for the rule.

DENMAN C. J. concurred.

Rule refused.

Saturday,
 January 12th.

BLOFELD against PAYNE and Another.

Declaration stated, that plaintiff, being the inventor and manufacturer of metallic hones, used certain envelopes for the same, denoting them to be his: and that defendants wrongfully made other hones, wrapped them in envelopes resembling the plaintiff's, and sold them as his own, whereby the plaintiff was prevented from selling many of his hones, and they were depreciated in value and reputation, those of the defendants being inferior:

Held, that the plaintiff was entitled to some damages for the invasion of his

CASE. The declaration stated that the plaintiff was the inventor and manufacturer of a metallic hone for sharpening razors, &c., which hone he was accustomed to wrap up in certain envelopes containing directions for the use of it, and other matters; and that the said envelopes were intended, and served, to distinguish the plaintiff's hones from those of all other persons; that the plaintiff enjoyed great reputation for the good quality of his hones, and made great profit by the sale thereof; that the defendants wrongfully and without his consent caused a quantity of metallic hones to be made and wrapped in envelopes resembling those of the plaintiff, and containing the same words, thereby denoting that they were of his manufacture, which hones the defendants sold so wrapped up as aforesaid, as and for the plaintiff's, for their own gain, whereby the plaintiff was prevented from disposing of a great number of his hones, and they were depreciated in value and injured in reputation, those sold by the defendants being greatly inferior. Plea, the general issue. At the trial before Denman C. J. at the sittings in *London* after last term, though he did not prove that their hones were inferior, or that he had sustained any specific damage.

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it appeared that the defendants had obtained some of the plaintiff's wrappers, and used them as stated in the declaration; but no proof was given of any actual damage to the plaintiff. The questions left by his Lordship to the jury were, first, whether the plaintiff was the inventor or manufacturer? and, secondly, whether the defendants' bones were of inferior quality? but he stated to them that even if the defendants' bones were not inferior, the plaintiff was entitled to some damages, inasmuch as his right had been invaded by the fraudulent act of the defendants. The jury found for the plaintiff, with one farthing damages, but stated that they thought the defendants' bones were not inferior to his. Leave was reserved to move to enter a nonsuit.

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Barstow now moved accordingly. The special damage alleged in the declaration was of the very essence of the case, and the plaintiff having failed to prove it, no ground of action remained. The whole struggle between the parties was, whether or not the defendants' bones were inferior to the plaintiff's, and the jury found that they were not. The declaration was not supported.

LITTLEDALE J. I think enough was proved to entitle the plaintiff to recover. The act of the defendants was a fraud against the plaintiff; and if it occasioned him no specific damage, it was still, to a certain extent, an injury to his right. There must be no rule.

TAUNTON J. I think the verdict ought not to be disturbed. The circumstance of the defendants' having obtained the plaintiff's wrappers, and made this use of them, entitles the plaintiff to some damages.

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PATTESON J. It is clear the verdict ought to stand. The defendants used the plaintiff's envelope, and pretended it was their own: they had no right to do that, and the plaintiff was entitled to recover some damages in consequence.

DENMAN C. J. concurred.

Rule refused (*a*).

(*a*) See the judgment of Taunton J. in *Marzetti v. Williams*, 1 B. & Ad. 425., and the authorities there cited.

In the Matter of Arbitration between WILLIAM
LOWE and WILLIAM HENRY JOHNSON.

The Court will not grant an attachment without personal service, in any case where the party applying has another remedy.

THE parties submitted to arbitration, and the submission was made a rule of Court. The award was against *Lowe*. Attempts having been made without success to serve him with copies of the award and rule of Court, *Kelly*, in the last term, moved, on affidavits setting out the special facts, for a rule to shew cause why an attachment should not issue for non-performance of the award. The Court thought that proper exertions had been made, but as the end of the term was near, they recommended that the matter should stand over till this term, and in the mean time further endeavours be used to effect a personal service. In the beginning of this term *Kelly* renewed his motion. There had been no personal service, and it appeared that the party knew it was intended, and avoided it.

Per Curiam. We have considered this matter, and are of opinion that we ought not to grant an attachment without

without personal service in any case where the party applying has another remedy.

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Rule refused (a).

In the Matter
of LOWE and
JOHNSON.

The party was afterwards served, and shewed cause.

(a) See *In the Matter of Bower*, 1 B. & C. 264.

SMITH *against* GOODWIN and RICHARDS.

Monday,
January 14th.

THE first six counts of the declaration were in case, for an irregular distress. The seventh count was as follows: That, before the committing of the grievances next mentioned, to wit, on the 31st day of *August* 1831, the defendants took and distrained certain goods as a distress for rent then alleged to be due from the plaintiff to the defendant *Goodwin*, for and in respect of certain premises in the possession of the plaintiff, which goods were of more than sufficient value to have satisfied the rent, and the costs and charges attending such distress, and the sale of the goods under such distress, and incidental thereto; that the defendants having so taken and distrained the goods, had and retained possession of the same under such distress for a long space of time, to wit, five days then following, and, afterwards, and at the expiration of the said space of time, the defendants voluntarily abandoned the possession of the said goods, and the said distress thereon, and although the said defendants under the said distress, and by virtue thereof, could and might have satisfied the said arrears of rent, and all reasonable and lawful charges in

After distress made by a broker, in a case within 57 G. 3. c. 93, the rent and charges may still be tendered to the landlord.

Declaration contained six counts in case; the seventh charged, that the defendants took and distrained the goods of the plaintiff for rent, of more than sufficient value to satisfy the rent and costs, and then voluntarily abandoned the same, and afterwards wrongfully, injuriously, and vexatiously again took and distrained the same goods for the same rent, and refused to return the same, and con-

verted them to their own use: Held, on motion in arrest of judgment for misjoinder of case and trespass, that although this second taking of the goods was a trespass, yet the plaintiff might bring case for the conversion, and that the count was an informal one in case, and sufficient after verdict.

that 2 Bac. 691
y — 531.

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that behalf; nevertheless, the defendants knowing, &c. but contriving, &c., to wit, on the 7th day of *September* 1831, wrongfully, injuriously, and *vexatiously* made a second distress upon goods of the plaintiff for the same identical alleged arrears of rent, in respect whereof the distress first-mentioned was made as aforesaid, and again took the said goods as a distress for the same rent so pretended to have been due as aforesaid, and wrongfully and injuriously refused to return the same to, and withheld them from the plaintiff under the said second distress for a long time, to wit, six days then following, and converted and disposed thereof to their own use, although requested to deliver the said goods to the plaintiff; whereby the plaintiff is injured in his credit and circumstances. The eighth count was in trover. Plea, not guilty.

At the trial before *Denman* C. J., at the *Middlesex* sittings after last *Michaelmas* term, the following appeared to be the facts of the case:—The plaintiff was tenant to *Goodwin*, at a yearly rent of 25*l.* Half a year's rent having become due at *Midsummer* 1831, on the 31st of *August* the defendant *Richards*, by *Goodwin's* order, distrained on the premises. On the 2d of *September*, *Smith*, the plaintiff, tendered to *Goodwin* (the landlord) twelve sovereigns and a half for the rent, and thirteen shillings for expenses, which he (*Goodwin*) refused to accept, saying, that he had left the matter in the hands of *Richards*, and that *Smith* must settle with him. On the 3d of *September*, the plaintiff tendered to one *Nash*, the man in possession, 13*l.* 3*s.* for rent and expenses, and demanded a receipt, which *Nash* being unable to give, the money was not paid. *Nash* then abandoned the possession; but *Richards*, on the 7th of *September*, by
Goodwin's

Goodwin's command, re-entered. *Smith*, to prevent his goods from being sold, paid the money under protest; and he brought the present action for the distress of the 7th of *September*. The Lord Chief Justice was of opinion that the tender to *Goodwin* was a good tender, and directed the jury to find a verdict for the plaintiff. The jury found for the plaintiff, damages 10*l*.

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Coltman now moved, first, for a new trial, on the ground of misdirection, or, secondly, to arrest the judgment on the ground that there was a misjoinder, the first six counts being in case and the seventh in trespass. Where a party has employed a broker to make a distress, he is the person to whom the tender should be made; he is the agent of the landlord for the purpose of receiving the rent; and having an interest in part of the money to be tendered, viz. the costs of the distress, he is the person with whom the settlement ought to be. The 57 G. 3. c. 93., which regulates the costs of distresses below a certain amount, recognizes the broker as the person who is entitled to receive certain costs from the tenant, and prevents him from taking more than certain specified sums; and, in case he does so, subjects him to pay treble the amount of the monies unlawfully taken. Section 4. authorizes the justice to give costs to the party complained against, if the complaint be unfounded; and there is a proviso that the act shall not empower the justice to make any order against the landlord for whose benefit any such distress shall have been made, unless such landlord shall have *personally* levied such distress. The proper tender, therefore, in this case, was to the broker. The landlord was entitled to throw on him

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him the burden of fixing the amount of charges, and was right in refusing to accept the tender made to himself personally.

Assuming, however, this to be an insufficient ground for a new trial, the judgment ought to be arrested. The seventh count, if considered as a count in case, is bad, as shewing a trespass. If in trespass, it is a misjoinder, and the damages being entire, the judgment must be arrested. Now the second seizure of the goods alleged in that count being one without any right, is a substantive trespass. In *Winterbourne v. Morgan* (a), a party who had entered under a warrant of distress for rent in arrear continued in possession of the goods upon the premises for fifteen days, during the four last of which he was removing the goods, and they were afterwards sold under the distress: he was held to be a trespasser for continuing on the premises, and disturbing the plaintiff in the possession of the house after the time allowed by law. So in *Wallis v. Saville* (b), the declaration was *trespass* for taking the plaintiff's cattle at two several times; the defendant pleaded a demise, and 77*l.* 10*s.* rent in arrear, and that he took the first distress for 62*l.* parcel of the rent, and the second distress for 15*l.* 10*s.* residue of the rent; and judgment was given for the plaintiff, because the second distress was not legal. Here the case is much stronger; for the allegation is, that the defendants voluntarily quitted and abandoned the possession of the goods seized under the first distress, and that they afterwards, on the 2d of *December*, seized the same goods a second time for the same rent. That second distress was a substantive act of trespass.

(a) 11 *East*, 395.(b) 2 *Lutw.* 1552.

DENMAN C.J. We are all of opinion, that the tender to the landlord was sufficient; but that on the other point there should be a rule.

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LITTLEDALE J. The tender to the landlord, the party to whom the rent was due, was sufficient in this case. The 57 G. 3. c. 93. has no application to a case like this. It only applies to costs; and it does not supersede the authority of the landlord to receive the money due to him for the rent, as well as the lawful charges attending the distress.

PATTESON J. I think the tender to the landlord was sufficient. Independently of the act of parliament, a tender to the landlord of a sum sufficient to cover the rent and charges would be clearly good. The act does not prevent a tenant from tendering his rent to his landlord; but if he tenders it to the broker, and the latter takes more than the sum he is entitled to, then it subjects the broker to a penalty of treble the amount of the sum unlawfully charged.

Rule for a new trial refused.

Scarlett and *Platt*, in the following *Trinity* term, shewed cause against the rule for arresting the judgment. The seventh count is in case, and not trespass. *Branscomb v. Bridges* (a) shews, that where the goods of a tenant are distrained for rent in arrear after the amount has been tendered, the tenant may bring an action on the case for an excessive distress. It was there objected, that the taking of the plaintiff's goods after the rent had

(a) 1 B. & C. 145.

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been tendered was the subject of an action of trespass. But the Court held, that, assuming that to be so, the plaintiff was at liberty to waive the trespass and bring an action on the case. So, here, assuming that the second seizure of the goods was a trespass, the plaintiff may waive it, and bring an action on the case for taking his goods and converting them.

Coltman contra. In *Branscomb v. Bridges* (a), the Court held in effect that there were two causes of action, viz. trespass for an illegal entry, and case for an excessive distress taken, and that the plaintiff had his election of either remedy; and it must undoubtedly be conceded that in certain cases a party may have either trespass or case at his election. The principle seems to be correctly stated by Mr. *Wedderburn* arguendo in *Harker v. Birkbeck* (b), that “both actions may lie where there is both an immediate and also a consequential injury done, and the plaintiff therein being entitled to both actions, must have his election to proceed in either.” But where the remedy is sought in case, the party must shew a consequential damage on the face of the count, to maintain his action in that form. It will not do to state a bare trespass and join it with case, on the score that there are circumstances not stated which would enable him to maintain case. Suppose the count had stated merely that the defendant broke and entered into the house of the plaintiff and seized and sold his goods, it may be that an action would be maintainable in case, because the selling or appraisement was irregular, or the amount taken exces-

(a) 1 B. & C. 145.

(b) 3 Burr. 1561.

sive;

sive; but the possibility of a state of things not averred cannot be a sufficient reason for holding that case is maintainable: if a count in trover and a count in trespass were joined, the joinder might be defended on the same ground. But it may be said this is not a count in trespass, but a bad count in case. The test, however, is to consider whether the cause of action stated is a matter for which trespass or case lies. It is not the commencement of the declaration but the statement of the cause of action that determines what the action is. Suppose a count begins in debt, and states a mere trespass, could it be joined with detinue? Here the cause of action stated in the count is the second seizure of the goods, which was without any right, and therefore was a mere trespass. The cases of *Winterbourne v. Morgan*(a), *Etherton v. Popplewell* (b), and *Wallis v. Saville* (c), are in point to shew that trespass was the proper form of action.

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DENMAN C. J. The authorities cited shew that trespass may, not that it must, be brought in such a case as this. In *Branscomb v. Bridges* (d), it was contended that the taking of the plaintiff's goods under a distress, after the rent due had been tendered, being without any colour of right, was the subject of an action of trespass only; but the Court held that, though trespass might lie for that act, the plaintiff was at liberty to waive the trespass, and bring an action on the case; and it was there observed by the Court that trover would lie after a wrongful taking, and that that was a stronger case. I think, therefore, that, though the taking of the plaintiff's

(a) 11 *East*, 395.(b) 1 *East*, 139.(c) 2 *Lutw.* 1532.(d) 1 *B. & C.* 145.

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goods a second time was a trespass, he was at liberty to waive it, and bring case for the consequential injury arising to him from the unlawful detention of his goods; and that the seventh count may be considered a count in case.

LITLEDALE J. I also think that the seventh count may be considered a count in case, because it alleges that the defendants *vexatiously* (a) made the second distress. An action on the case will lie against a man for maliciously splitting his cause of action.

PARKE J. I have entertained some doubt upon this case in the course of the argument; but, on the whole, I think the declaration may be supported. I agree that trespass might be maintained in respect of the act there alleged, viz. the second seizure by the landlord. So it might in all cases of a wrongful taking of goods, and yet in many such cases trover, which is a special action on the case, is maintainable; and it seems to me that the seventh count is an informal count in trover, setting forth specially circumstances which it was unnecessary to state, but which are the subject of such an action. That count alleges, in substance, that goods of the plaintiff came to the possession of the defendants, and that they refused to deliver them to the plaintiff, and converted them to their own use. It may then be con-

(a) In *Comyns's Digest, Action upon the Case for a Deceit*, (A. 4.) it is said, that case lies if a man procure a vexatious suit; as, if a man sue a *capias* upon a forged statute, and *Fitzherbert, N. B.* 96. *B.* is cited. So if a man procure another to commence an action in any court against *A.* to vex him. *F. N. B.* 98. *N.* So if a man sue *vexatiously*, as if he sue in an inferior court, and has judgment and execution, when the defendant knew nothing of the suit. *Lut.* 67.

sidered

sidered an informal count in trover, and after verdict is sufficient.

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PATTESON J. The true ground upon which this declaration is to be supported, appears to me to be that stated by my brother *Parke*, viz. that the seventh count is an informal count in trover.

Rule discharged.

KIRK *against* STRICKWOOD.

Tuesday,
January 15th.

ASSUMPSIT on a promissory note for 19*l.* 18*s.* 6*d.*, dated 28th of *October* 1830, payable to the plaintiff, described in the note as overseer of the poor of the parish of *St. Mary, Whitechapel*; and on counts for meat and other necessaries furnished to *Sarah Maria Strickwood* at the defendant's request. Plea, non-assumpsit. At the trial before *Denman* C. J., at the sittings in *London* after last *Michaelmas* term, the facts appeared to be as follows:—On the 30th of *August* 1830, at the instance of the parish officers of *St. Mary, Whitechapel*, an order was made by two justices in petty sessions, adjudging that the said *Sarah Maria Strickwood*, therein stated to be the defendant's daughter, was unable to maintain herself, and was chargeable to the said parish, and that the defendant was able to maintain her, and requiring him forthwith to pay the parish officers 15*l.* 8*s.* for her maintenance down to the

A defendant, prosecuted by parish officers for disobeying an order of maintenance, was convicted, and sentence deferred by the court, with a view to an arrangement: in the meantime he was committed to prison, and the officers demanded of him a sum considerably exceeding the amount of maintenance due, but part of which was to cover costs.

A. paid part, and gave a note for the remainder; he was then brought before the court, fined

1*s.*, and discharged. It did not appear whether or not the particulars of the arrangement were communicated to the court, but *A.* made no complaint when brought up. In an action afterwards brought upon the note:

Held, that no irregularity appeared in the compromise, and that the note was legal.

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time of making the order, and 11s. 6d. weekly so long as she should be chargeable, or till he should be legally directed to the contrary. Not complying with the order, he was indicted for the disobedience at the *Middlesex* sessions in *October* following, and convicted; but the Court deferred passing sentence, with a view to an arrangement, and in the mean time he was committed to prison. It was there communicated to him, on behalf of the overseers, that 40*l.* would be required to settle the matter: his wife raised 20*l.*, which was paid, and, while still in prison, he gave the note in question for the rest of the demand. Part of the payment, but it did not clearly appear what, was intended to cover costs. The defendant was afterwards brought before the Court, fined a shilling and discharged, it being understood that an arrangement had taken place. On the defendant's part it was insisted, that the note given under these circumstances was void. A verdict having been found for the plaintiff,

Kelly, by leave reserved, now moved for a rule to shew cause why a nonsuit should not be entered. The question will be, whether the present case is or is not distinguishable from *Beeley v. Wingfield* (a), where a compromise of this kind was allowed after conviction; but Lord *Ellenborough* said there, "If we had seen any ground for suspecting that the authority of the Court had been used as an instrument of oppression or extortion, we should have watched the case very jealously." The difference between that case and this is, that the terms there were dictated by the Court. No other party

(a) 11 *East*, 46.

is competent to prescribe them (*a*), for the Court only knows what the punishment would be. If the sum taken from the defendant here had been merely that charged in the order of justices, or if the precise grounds of the agreement had been laid before the sessions, there might have been more reason for contending that *Beeley v. Wingfield* (*b*) applied: but under the circumstances proved, the proceeding was irregular, and is not sanctioned by that case.

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DENMAN C. J. I think the distinction relied upon does not take this case out of the authority of *Beeley v. Wingfield* (*b*). The defendant, when he was brought up for sentence, had an opportunity of applying to the Court if he thought the sum proposed to be taken from him was too large. There will be no rule.

LITTLEDALE J. The note is *primâ facie* good. It has not been shewn that the sum taken was excessive: and the defendant might have urged his objections, if he had any, when he was brought up for judgment at the sessions.

TAUNTON J. The case is within the principle of *Beeley v. Wingfield* (*b*). When the defendant was brought up for sentence, I should apprehend that the terms of the

(*a*) See *Baker v. Townshend*, 1 *B. Moore*, 120., where an assault, with various other matters in dispute, and costs, were referred to arbitration by the sessions, *after conviction*; and the Court of Common Pleas held it right. *Secus*, where a misdemeanor wholly of a public nature was compromised by consent of the committing magistrates, *without trial*. *Edgcombe v. Rodd*, 5 *East*, 294. See 4 *Bl. Comm.* 363, 364.

(*b*) 11 *East*, 46.

1833. arrangement must have been communicated to the Court and received their sanction.

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PATTESON J. The defendant seeks, at a great distance of time, to set aside an agreement which he had an opportunity of objecting to when it was first made. We must presume, now, that it was a fair and satisfactory agreement, or else the defendant would have applied to the Court at the time.

Rule refused.

Wednesday.
January 16th.

KEMP *against* THOMAS BURT, Gentleman, and
WILLIAM CURTIS BURT, Gentleman.

In an action
against attor-
nies for negli-
gence, it ap-
peared that the
plaintiff em-

CASE against attornies for negligence. The de-
claration stated that the plaintiff retained the defend-
ants to commence and prosecute an action for him

employed the defendants to conduct an action for him against a surveyor of turnpike roads, for alleged trespasses. The surveyor had seized and impounded plaintiff's sheep, as having been found straying on the road: the plaintiff regained possession of them, by promising the pound keeper to pay the proper charges, and drove them home; on the same day the surveyor retook the sheep in the plaintiff's field, and again impounded them. The first and second taking were in *Surrey*, but on an intermediate day the sheep had escaped and been impounded in *Sussex*. The turnpike act, 4 G. 4. c. 95. s. 75. only authorizes surveyors to impound sheep found on a turnpike road. The general turnpike act, 3 G. 4. c. 126. s. 147. (incorporated in the above statute by reference) requires that actions against any person for *any thing done in pursuance of the act*, shall be commenced within three months, and the venue laid in the county where the cause of action arose.

The attornies commenced the action within three months, and had a declaration drawn by counsel, who returned it with an observation indorsed, that it would have been prudent to join two other parties. The attornies thereupon (with the plaintiff's assent) discontinued the action, and brought another after the expiration of the three months, laying the venue in *Sussex*. The declaration was settled by counsel, and the case afterwards submitted to a special pleader, who gave as his opinion, that the protecting clause of 3 G. 4. c. 126. did not apply to the trespass in seizing the sheep in the plaintiff's field. The plaintiff went to trial, and was nonsuited, on account of the action being out of time and the venue improper, with leave to move, which was done without success:

Held, that this was not a case of actionable negligence in the attornies.

Quære, Whether the surveyor, in making the second seizure, was within the protection of 3 G. 4. c. 126. as acting in pursuance of that statute, or 4 G. 4. c. 95.: Held, that at all events there was so much doubt on this point, that the attornies, if mistaken upon it, were not therefore culpably negligent.

5 B & A. d. 138.

against

against one *Silvester*, for having seized certain sheep and cattle of the plaintiff on a turnpike road in *Surrey*, and impounded the same, *Silvester* being at the time surveyor of the said road, and acting as such surveyor, and the sheep, &c. being alleged to have been found straying on such road; that it was the duty of the defendants to bring the action within three months of the seizure and impounding, and lay the venue in *Surrey*; but that they, having commenced an action, improperly discontinued the same without the plaintiff's leave, and brought another action not within three months, and laid the venue in *Sussex*, by reason whereof the plaintiff was nonsuited, and had 10*8*l. levied upon him for costs, &c. Plea, the general issue. At the trial before *Tindal* C. J., at the Spring assizes for *Surrey*, 1832, the facts appeared to be as follows : —

The sheep and cattle were taken, as above stated, by *Silvester*, who was surveyor of the *Horley* and *Cuckfield* turnpike roads, on the 26th of *April* 1828, in *Surrey* (near the borders of *Sussex*), and impounded at *Horley* in the former county. They afterwards escaped; the cows returned home, and the sheep, being retaken, were again impounded at *Worth* in *Sussex*. The pound-keeper there, on the 29th of *April*, allowed the plaintiff to take them away, on his promise to pay what was claimed for them, and the plaintiff drove them back into *Surrey*, where, on the same day, *Silvester* retook them in a field belonging to the plaintiff, and again put them in the pound. Two persons, named *Town* and *Mercer*, assisted him in both seizures. The plaintiff afterwards employed Messrs. *Burt*, the present defendants, to bring an action for the alleged trespasses, and they sued out a writ, against *Silvester* only, on the 2d of *May* 1828.

Instruc-

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Instructions for a declaration were laid before counsel, indorsed with the words *Sussex latitat*, and the names of the parties; there was also a reference to the statutes 3 G 4. c. 126. s. 123. 4. G. 4. c. 95. s. 75. (a), written upon the instructions by one of the Messrs. *Burt*. The learned counsel drew the declaration, containing two counts, one for the original taking in the road, the other for the retaking on the plaintiff's premises; and he returned the declaration (in *November* 1828) with the following observations indorsed:—"I have confined the declaration to the two occasions on which the cattle were taken away. It would have been prudent to have issued the writ against *Silvester's* two associates, and joined them in the action, as they were clearly co-trespassers with him, and their evidence therefore must be anticipated in his favour, and will be likely to be extremely prejudicial to the plaintiff." Messrs. *Burt* then wrote to the plaintiff, stating that counsel recommended the two accomplices to be joined, and asking what he, the plaintiff, said to it: and it was determined, with the assent of the plaintiff, that the action should be discontinued, and

(a) By 4 G. 4. c. 95. s. 75. it is enacted, that "If any horse, ass, sheep, swine, or other beast or cattle of any kind, shall at any time be found tethered, or wandering, straying, or lying about any turnpike road, or on any part thereof, (except on such parts of any road as lead or pass through or over any common or waste or uninclosed ground,) it shall and may be lawful for any surveyor of the road where the same shall be found, or any other person or persons whomsoever, to seize and impound every such horse, ass, sheep, swine, or other beast or cattle, in the common pound (if any) of the parish, township, tithing, or place where the same shall be found, or in such other place as the trustees or commissioners of the road where the same shall be found shall have provided, or shall provide for that purpose; and the said horse, ass, sheep, &c. there to detain until the owner thereof shall for every and each horse, ass, sheep, &c. so impounded, pay the sum of 2s., together with reasonable charges and expences, &c. to the surveyor." 3 G. 4. c. 126. s. 123., is not material to this case.

another

another commenced against all the parties. A writ was accordingly sued out, in *November* 1828, against *Silvester, Town, and Mercer*, and the declaration was amended by counsel, the names of the two latter parties being introduced. When the cause was at issue, the trustees of the turnpike roads made an offer of compromise, which the defendants advised the plaintiff to accept, being then doubtful as to the result of a trial; but the plaintiff refused, not being satisfied with the terms. A case was afterwards laid before a special pleader, with a copy of the declaration; the question proposed being, whether or not the defendants could avail themselves of the protection of the general turnpike act. (a) The gentleman consulted gave as his opinion that, in respect of the latter seizure, the defendants could not avail themselves of that protection either as to the venue or the limitation of the action. On the trial at *Lewes*, at the Summer assizes 1829, it was objected that the action was commenced too late, and the venue improper, and the learned Judge who tried the cause directed a nonsuit on both points, giving leave to move that the nonsuit should be set aside; which motion was made in the following term without success, and the defendants had execution for their costs.

Upon these facts, *Tindal C. J.* was of opinion that

(a) 3 G. 4. c. 126. s. 147., which enacts, "That if any action shall be commenced against any person, for any thing done in pursuance of this act, then and in every such case such action or suit shall be commenced or prosecuted within three months after the fact committed, and not afterwards; and the same and every such action or suit shall be brought in the county or place where the cause of action shall have arisen, and not elsewhere:" and if the action be otherwise brought, the jury shall find for the defendant; and if the plaintiff shall become nonsuit or have a verdict against him, the defendant shall have treble costs. These provisions are kept in force as if re-enacted, by 4 G. 4. c. 95. s. 88.

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the

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the case was one in which Messrs. *Burt*, the defendants, might reasonably doubt whether that which had been done by the surveyor, was done in pursuance of the statute (*a*), and he directed a nonsuit, with liberty to move to enter a verdict for 108*l.*, the amount of costs levied. A rule having been obtained for this purpose,

Platt and *Channell* now shewed cause. The nonsuit was right, there being no evidence to go to the jury of that *crassa negligentia* without which an attorney cannot be subjected to an action of this nature. If he has shewn care, skill, and integrity, it is not every inadvertence or error of judgment that will render him liable to an action. In the present case instructions were in the first instance laid before counsel, with an indorsement calling his attention to the statutes; and he returned the declaration with a suggestion that the other trespassers should have been joined, but not warning the parties that a new action would be too late. Upon that suggestion the defendants acted. The suit being commenced anew, the declaration was again laid before counsel to be amended. When a doubt afterwards arose of the plaintiff's ultimate success, the defendants recommended his acceptance of a compromise, which he refused; and the case was then laid before a special pleader, who encouraged the parties to go on. Lord *Mansfield* said, in *Pitt v. Yalden* (*b*), that an attorney

(*a*) During the trial it was urged on behalf of the defendants, that the second taking was not an act so done, and therefore that the limitations as to time and venue did not apply; but the Lord Chief Justice held that he could not nonsuit, because he could not say that the former nonsuit was wrong on the very ground on which it proceeded.

(*b*) 4 *Burr.* 2061.

ought

ought not to be liable in cases of reasonable doubt. Here a reasonable doubt did exist, first, whether there was not such a continued detention as made the surveyor liable for a trespass in *Sussex*; and then, whether the last taking of the sheep in *Surrey* was “a thing done in pursuance of the act” 3 G. 4. c. 126., or whether, on the contrary, it was not altogether irregular and unprotected by that statute; for the sheep were seized, not on the highway, but on the plaintiff’s land; and if the seizure was to be considered as a retaking, that ought to be on fresh pursuit, which was not the case here. At all events, this question, whether there was sufficient doubt upon the second taking to excuse the present defendants, was a point of law, and it was for the Judge who tried the present cause to decide it, and not to leave it to the jury: as in actions for malicious prosecution, if no fact is disputed, the Judge determines the question of probable cause (a). Now the Judge at least thought that point doubtful, for he directed a nonsuit, reserving leave to move; and the question, arising upon two turnpike acts, which it was necessary to couple together, was one upon which doubt might well arise. The Court here called upon

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Thesiger contrà. An attorney is not bound to know all the clauses of any particular act or acts of parliament; but here it is plain that the attention of the defendants had been called to the particular sections on which the case turned, and they should have been masters of those. They themselves gave a direction to counsel by the words “*Sussex latitat*,” the facts of the

(a) *Taylor v. Willans*, 2 B. & Ad. 845.

case

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case on which the venue depended, being well known to them when they did so. The 147th section of 3 G. 4. c. 126. is perfectly clear as to the limitation of time, and the first action was brought sufficiently soon: the observation of counsel indorsed on the declaration, was not advice to withdraw one action and begin another. [Denman C. J. It was a good reason for doing so, if the law allowed it.] But not for doing it at all hazards, upon their own authority, and that was the negligence. It was at least unsafe to do it, and they were apprised of the enactment which made it so. This is not a case, like *Baikie v. Chandless* (a), turning upon a doubtful construction of a statute, only established by decisions long subsequent to the passing of the act. Assuming that the defendants had had the specific advice of counsel to discontinue and bring a new action, they ought not to shelter themselves under that irresponsible authority. On such a point as this they ought to have known whether or not the advice they received was correct, *Godefroy v. Dalton* (b): they were answerable to their client for the propriety of the suggestions on which they acted.

DENMAN C. J. I think there was in this case no proof of gross negligence. I entertain the greatest doubt whether the second action was not properly brought. The first clearly was, but the defendants were induced to discontinue that by the very reasonable doubt which counsel suggested to them, whether certain parties who had not then been made defendants, ought not to have been joined: the omission of them, how-

(a) 3 Camp. 17.

(b) 6 Bingh. 460.

ever,

ever, in the first instance was clearly not an act of gross negligence. As to the second action, it occurs to me that, under the circumstances, the defendant, *Silvester*, was not protected by the statute; and if that were so, the action was rightly brought. I think, then, that here was, at all events, no case of culpable negligence. There is a difficulty in saying, if there is any case of negligence, that it shall not be submitted to a jury, but I think here it could not have gone to them.

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LITTLEDALE J. It has been taken for granted by the plaintiff's counsel that the defendant in the former action was protected by the 3 G. 4. c. 126. s. 147. and 4 G. 4. c. 95. s. 75. and 88. But as upon the second occasion the sheep were not taken upon the highway, according to the seventy-fifth section of the latter statute, it is clear that he would not have been within the letter of the 3 G. 4. c. 126. s. 147. as a person sued "for any thing done in pursuance of that act;" though he might have been entitled to the benefit of that liberal construction which the Courts have sometimes, but not always, given to clauses so worded. There are cases where officers have been held to be within the protection of such clauses, though they have not acted strictly under the authority of the statutes (*a*); and others where such a construction has not been admitted, as where actions have been brought to recover back money improperly taken (*b*). But an attorney is not liable for gross negligence, if, looking at the express

(a) See *Cook v. Leonard*, 6 B. & C. 351., where several are cited by Bayley J.

(b) See *Irving v. Wilson*, 4 T. R. 485. *Morgan v. Palmer*, 2 B. & C. 729.

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words of the statutes in question here, he has supposed that they would be literally followed; he is not bound to know in what cases the Court would put a more liberal construction upon them. The Lord Chief Justice, who tried the present cause, appears to have had some doubt: on the former trial, the point was reserved: and it appears that in the course of that cause the present defendants were advised by a special pleader that the parties against whom they were proceeding were not within the protection of the general turnpike act. I am therefore of opinion that an action for negligence was not maintainable, and that the present rule must be discharged.

TAUNTON J. concurred.

PATTESON J. I am of the same opinion. The only doubt I had was, whether the defendants ought to have discontinued the former action without further advice. But that only brings it to the question whether the limitation as to time in the general turnpike act applied, so as to bar the second action.

Rule discharged.

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JOHN PRICE *against* EASTON.Thursday,
January 17th.

DECLARATION stated that one *William Price* was indebted to the plaintiff in the sum of 13*l.*, being the balance of a larger sum due for the price of a certain timber carriage sold and delivered to him; and that the defendant, in consideration thereof, and in consideration that the said *William Price*, at the request of the defendant, had undertaken and faithfully promised the defendant to work for him, the defendant, at certain wages agreed upon between them, and in consideration of *William Price* leaving the amount which might be earned by him in the defendant's hands, he, the defendant, undertook and promised to pay the plaintiff the sum of 13*l.* Averment that *William Price* did work for the defendant, and earned a large sum of money, and left the same in his, defendant's, hands. Breach, non-payment to the plaintiff of 13*l.* Plea, non-assumpsit. The plaintiff having obtained a verdict, a rule nisi was obtained by *Campbell* for arresting the judgment, on the ground that the plaintiff was a mere stranger to the consideration; and he cited *Bourne v. Mason* (a), and *Crow v. Rogers* (b); and distinguished the case from *Dutton v. Poole* (c), where tenant in fee-simple being about to cut down timber for his daughter's portion, the defendant, his heir at law, in consideration of his forbearing so to do, promised to pay a sum of money to the daughter, and the action by the husband of the daughter was held to be well brought; but there, it

Declaration stated that *W. P.* owed the plaintiff 13*l.*, and that in consideration thereof, and that *W. P.*, at the defendant's request, had promised defendant to work for him at certain wages, and also, in consideration of *W. P.* leaving the amount which might be earned by him in the defendant's hands, he, the defendant, undertook and promised to pay the plaintiff the said sum of 13*l.* Averment, that *W. P.* performed his part of the agreement.

Judgment arrested, because the plaintiff was a stranger to the consideration.

/ *Bac.* 353.
et 8 B. & C. 395.

(a) 1 *Vent.* 6.(b) 1 *Str.* 592.(c) 2 *Lev.* 210.

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was said, there was privity by blood, and the daughter was prejudiced by loss of her portion.

Justice now shewed cause. After verdict, it will be intended that every thing necessary to support the action was proved. An act from which the defendant receives a benefit, and from which inconvenience arises to the plaintiff, is a sufficient consideration to support an assumpsit. Here there was an advantage to the defendant, for he had the benefit of the labour of *William Price*, and was not bound to pay for it until the 31st of *March*. *Starkey v. Mylne* (a), *Disborne v. Denabie* (b), and *Wilson v. Coupland* (c), shew, that where there is a privity between the three parties, assumpsit is maintainable without an immediate consideration from the plaintiff to the defendant. In *Dutton v. Poole* (d) and *Curtis v. Collingwood* (e), there was no such consideration proceeding immediately from the plaintiff to the defendant. [Patteson J. No promise to the plaintiff is alleged; but merely a promise to pay the plaintiff.]

Campbell, Solicitor General, (and *Talfourd* was with him,) contra, was stopped by the Court.

DENMAN C. J. I think the declaration cannot be supported, as it does not shew any consideration for the promise moving from the plaintiff to the defendant.

LITTLEDALE J. No privity is shewn between the plaintiff and defendant. This case is precisely like *Crow v. Rogers* (g), and must be governed by it.

(a) 1 Roll. Abr. 32. pl. 13.

(b) 1 Roll. Abr. 31. pl. 5.

(c) 5 B. & A. 228.

(d) 2 Lev. 210.

(e) 1 Vent. 297.

(g) 1 Str. 592.

TAUNTON J. It is consistent with all the matter alleged in the declaration, that the plaintiff may have been entirely ignorant of the arrangement between *William Price* and the defendant.

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PATTESON J. After verdict, the Court can only intend that all matters were proved which were requisite to support the allegations in the declaration, or what is necessarily to be implied from them. Now it is quite clear that the allegations in this declaration are not sufficient to shew a right of action in the plaintiff. There is no promise to the plaintiff alleged. The rule for arresting the judgment must be made absolute.

Rule absolute.

DOE dem. BAGGALEY *against* HARES.Thursday,
January 17th.

EJECTMENT by mortgagee of tolls and toll-houses against the lessee. At the trial before *Littledale J.*, at the *Stafford Spring* assizes, 1832, the plaintiff proved, by the attesting witness, the execution of the mortgage-deed of the tolls, toll-houses, and toll-gates on the 27th of *October* 1829, by five trustees, *Mr. R. Haywood* being one of them; and further, that he and the other four had acted as such for eight or nine years. The defence was, that *Haywood* was not duly appointed a trustee.

By the general turnpike act, 3 G. 4. c. 126. s. 134., it is enacted, "that where any action shall be brought by or against any trustee of a road, evidence of the trustee having acted as such, together with the act of parliament by which he was appointed, or

the order, or a copy of the order for his appointment or election, *in case he was appointed or elected by the trustees*, shall be sufficient proof of his being a trustee."

Held, that the words *in case he was appointed or elected by the trustees*, applied to cases where there was an appointment or election de facto by the trustees, in contra-distinction to an appointment by the road act; and, therefore, proof of a party having acted as trustee, and of an order made by the trustees for his appointment or election, was sufficient; and that even under a local act, whereby the appointment of new trustees, on death or removal, was required to be under the hands and seals of five of the old trustees, and although it was shewn that the order for such appointment was not so made.

F f 2

By 6 B. & C. 322.

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 DOR dem.
 BAGGLEY
 against
 HARRIS.

By the local acts for making and repairing the road from *Lawton* in *Cheshire*, to *Burslem* and *Newcastle-under-Lyne* in the county of *Stafford*, the trustees, or any five or more of them, on the death or refusal to act of a trustee, had power to appoint or elect by writing under their hands and seals any other person qualified as therein mentioned, and these (which were declared to be public) acts required that all securities on the tolls, toll-houses, or toll-gates should be executed by five trustees. To shew that *Haywood* had not been appointed under the hands and seals of the trustees, their books were offered in evidence by the defendants. They were objected to on the ground that the trustees were estopped by their own deed from disputing its validity. *Littledale J.* was of opinion that although an individual might be estopped, yet as the mortgage was the creature of the act of parliament, and the trustees acted not for their own benefit, but for that of the public, they were not estopped; he therefore admitted the evidence, and the following entry was read:—"At a meeting held the 14th of *August* 1821, duly convened, it was ordered that certain persons therein named (Mr. *R. Haywood* being one of them) be elected trustees for putting in execution the powers of the several acts of parliament relating to the road, in the room of" several persons therein named, who were dead, or refused to act. This order was not under the hands and seals of the trustees, but was signed by their clerk. The learned Judge was of opinion that there was no legal appointment of *Haywood* by this entry, and consequently that the mortgage-deed was not executed by five trustees, as required by the act; and *Campbell* then contended that the jury might presume an appointment under seal.

The

The learned Judge thought that there was no ground for making such presumption, and nonsuited the plaintiff. A rule nisi having been obtained for setting aside the nonsuit,

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Talfourd now shewed cause. *Haywood* was not legally appointed trustee, and if that be so, then the other trustees are not, by reason of their having been parties to the mortgage-deed, estopped from insisting on the illegality of their deed, for the general principle that a party is estopped by his own deed, does not apply to a case where he is a trustee, acting not for his own benefit, but for that of the public, *Fairtitle dem. Mytton v. Gilbert (a)*. Then if *Haywood* was not a trustee, it follows that the mortgage was by four instead of five trustees, and consequently that it is void. It will be said that evidence of *Haywood's* having acted, and of the order made for his appointment, was sufficient, and the 3 G. 4. c. 126. s. 134. will be relied on. It enacts, that in all cases where any action shall be brought against any trustee or trustees of a turnpike road, evidence of such trustee or trustees having acted as such, together with the act of parliament by which he or they was or were appointed, or the order or a copy of the order for his or their appointment or election, *in case he or they was or were appointed or elected by the trustees*, shall be sufficient proof of his or their being a trustee or trustees. That section, therefore, makes the order, or a copy of the order, evidence of a party's being a trustee, *in case he were appointed or elected by the other trustees*. Here *Hay-*

(a) 2 T. R. 169.

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 DOR dem.
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wood never was appointed by the trustees, because the local act requires that such appointment, to be valid, should have been under their hands and seals. That provision not having been complied with, the plaintiff is not aided in this case by the 134th section of the general turnpike act.

Campbell, Solicitor-General, and *Richards* contra. The manifest intention of the legislature was, that wherever a trustee was appointed by surviving trustees, his having acted as such, and the order for his appointment, should be sufficient evidence of his being a trustee. The local act says that the *appointment*, not the order for it, shall be under seal. The general turnpike act 3 G. 4. c. 126. s. 66. authorizes the surviving trustees, upon the death, bankruptcy, or insolvency of a trustee, to elect and appoint another; and that every person who shall be elected and appointed a trustee pursuant to the directions of the act, shall act with the surviving trustees in execution thereof to all intents and purposes as if he had been therein named and appointed a trustee. [*Talfourd*. The order for the appointment of *Haywood* was made before the 6th of *August* 1822, when that act passed.] Section 4., after reciting that it is of great importance that one uniform system should be adhered to in the laws for regulating turnpike roads throughout the kingdom, enacts, “that all the provisions in this act contained shall be construed to extend to all acts of parliament now in force or which shall hereafter be passed for making or maintaining any turnpike road.” In *Pritchard v. Walker* (a), which

(a) 3 Car. & P. 212.

was an action against the trustee of a turnpike road, an order of trustees which ought to have been signed by five being produced, the plaintiff proposed to shew that one of the five who signed the order was not a trustee, because he had not qualified himself to act by taking the oath prescribed by the 3 G. 4. c. 126. s. 62.; but *Vaughan B.* refused to receive such evidence. The 134th section provides that the modes of proof there pointed out shall be sufficient in two cases: the first where the party is named a trustee in the local act, and the second, where he is appointed or elected by the other trustees. The words in case he or they were *appointed or elected*, refer to an appointment or election de facto, and not to a regular legal appointment. If that were not so, the latter provision would be wholly nugatory, for it would be necessary in every case to prove, besides the order, a legal appointment. But, secondly, the defendants, who claim under the trustees, are estopped by their deed (which treats those who executed as trustees) from saying that *Haywood* was not a trustee. *Fairtitle dem. Mytton v. Gilbert* (a) only shews that trustees cannot by their acts annul an act of parliament; but, although the trustees may say that the act which they had done as trustees was not authorized by the act of parliament, the defendants are estopped from saying that those who acted as such were not duly appointed. Further, the fact of *Haywood* having acted as a trustee for so many years was evidence from which the jury might presume, if necessary, that an order under seal had been made.

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 DOX dem.
 BAGGALEY
 against
 HARRIS.

(a) 2 T. R. 169.

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BAGGALEY
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DENMAN C. J. The rule for setting aside the non-suit must be made absolute, and I am happy that we can come to that conclusion on legal grounds, for it would be extremely mischievous as affecting the value of these securities if an objection like the present could prevail. I think that, according to the true construction of the 134th section of the general turnpike act, proof of *Haywood's* having acted as a trustee, and of the order made by the other trustees for his appointment or election, was sufficient evidence of his being a trustee; and, consequently, that he was a trustee at the time when he executed the mortgage deed. The only doubt suggested arises upon the words "in case he or they was or were appointed or elected by the trustees;" but I think those words may be taken to refer to all cases when an order has in fact been made by the remaining trustees for the appointment or election of a new one.

LITTLEDALE J. I am inclined to think the trustees, acting in the execution of a public trust under an act of parliament, are not estopped from saying that this deed is not their own act (a). It is unnecessary, however, to decide that point, because it seems to me that the 134th section of the general turnpike act puts an end to the case. One question is, whether the clause has a retrospective effect. I think it has, and that it applies to an order or appointment made before that act passed. Another question is, whether it was intended to apply to all cases where an order was made by the trustees for the appointment or election of a new trustee, or only to

(a) See *The Stratford and Moreton Railway Company v. Stratton*, 2 B. & Ad. 511. *Hill v. The Proprietors of the Manchester Water Works*, *ibid.* 544.

cases where there was an actual valid appointment of such trustee. If it applied to the latter case only, it would be wholly useless, because, after proving an order made by the trustees for an appointment, it would also be necessary to prove a regular, valid appointment. I think it is manifest that the legislature intended to make the order of the trustees evidence, and consequently that the latter provision in the 134th section applies to all cases where an order has been made by the trustees for the appointment or election of a trustee. Consequently, evidence of *Haywood's* having acted as a trustee, and of the order, or a copy of the order for his appointment, was sufficient proof of his being a trustee.

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TAUNTON J. I also think that the rule should be made absolute, and my opinion proceeds simply upon the construction of the 134th section of the general turnpike act. I abstain from giving any opinion on the point of estoppel, in consequence of what fell from the Court in *Fairtitle dem. Mytton v. Gilbert (a)*. I think that the 134th section was intended to make the different modes of proof there pointed out sufficient evidence of the party's being a trustee, and to render unnecessary any ulterior enquiry as to his qualification. According to the argument for the defendant, after the proof stated in the latter part of that clause were given, it would be necessary to shew a regular appointment. If that were so, the clause would be a dead letter. The words "in case he or they was or were appointed or elected by the trustees," may be construed to apply to a case where there

(a) 2 T. R. 169.

has

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—
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 against
 HANES.

has been an appointment or election de facto. Then *Haywood's* having acted for nine years was *prima facie* evidence of his having been appointed a trustee, and the having been so appointed and elected will satisfy the words of the clause: and there was sufficient proof of his having been appointed de facto.

PATTESON J. The words "in case he or they was or were appointed or elected by the trustees," apply to the case where the party is not named trustee in the local act, but appointed after the passing of it. The order for appointment is, in the very clause, distinguished by the legislature from the appointment itself. If the local act, in this case, had said that the order for the appointment of a trustee should be under the hands and seals of five trustees, there would be more weight in the argument for the defendant.

DENMAN C. J. If the meaning of the words were that contended for by the defendant, the proof of an actual legal appointment could never be dispensed with. The construction would be most rigid, whereas I think it ought to be liberal, in order to further the manifest intention of the legislature to dispense with the formal proof which might otherwise be required.

Rule absolute.

1833.

BIRD *against* BOULTER.Thursday,
January 17th.

ASSUMPSIT for goods sold and delivered, and goods bargained and sold. Plea, the general issue. At the trial before *Littledale J.*, at the *Hereford* Spring assizes 1832, it appeared that the goods in question (wheat, the property of one *Smith*) were a lot sold at an auction, and knocked down to the defendant by the plaintiff, who was the auctioneer, at a price exceeding 10*l*. The course pursued at this sale was, that the parties as usual signified their biddings to the auctioneer, who repeated them aloud; and when the hammer fell, one *Pitt*, who attended as the auctioneer's clerk, called out the name of the purchaser, and, if the party assented, made an entry accordingly in the sale-book. In the present instance, the auctioneer having named the defendant as the purchaser, *Pitt* said to him, "Mr. *Boulter*, it is your wheat;" the defendant nodded, and *Pitt* made the entry in his sight, he being then within the distance of three yards. The question was, whether a note or memorandum of the bargain had been made, pursuant to 29 *Car. 2. c. 3. s. 17.*, by the party to be charged, or his agent thereunto lawfully authorized. A verdict was taken for the plaintiff, and leave given to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

In assumpsit *5th Nov.*
by an auc-
tioneer against
a purchaser, for
goods sold, an
entry in the
sale book by
the auctioneer's
clerk, who
attended the
sale, and, as
each lot was
knocked down,
named the pur-
chaser aloud,
and on a sign
of assent from
him, made a
note accord-
ingly in the
book, is a me-
morandum in
writing by an
agent lawfully
authorized,
within sect. 17.
of the statute of
frauds. For
the clerk is not
identified with
the auctioneer,
(who sues), and
in the business
which he per-
forms, of enter-
ing the names,
&c., he is im-
pliedly autho-
rized by the
persons attend-
ing the sale, to
be their agent.

*1 B. & C. 161,
1 H. & M. 769.*

The *Solicitor-General* (with whom was *Whateley*) now shewed cause. It is still, perhaps, vexata quæstio, whether sales by auction are within the seventeenth section

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section of the statute of frauds at all (*a*); but it is not necessary to discuss that point. The objection taken on the other side was, that, under the seventeenth section, one contracting party cannot constitute the other his agent, to sign the memorandum (which, it was said, was the effect of the present transaction); and *Wright v. Dannah* (*b*), and *Farebrother v. Simmons* (*c*), were cited. In the first of those cases, Lord *Ellenborough* held, that the agent who signed the memorandum must be a third person, and not one of the contracting parties; and, in the other, *Abbott C. J.*, referring to *Wright v. Dannah*, held, that an auctioneer's signature was not sufficient; where he sued as one of the parties to the contract. But the doctrine of these cases is not borne out by the words of the statute; and, at common law, there is nothing to prevent one contracting party from being the agent of the other; an obligor, for instance, from giving an obligee a power of attorney to execute a bond for him; a lessee from executing a lease, as attorney of the lessor; a party from accepting a bill by procuration, payable to his own order; assuming the authority in each case to be complete, which would be matter of evidence. It was admitted here, that *Smith*, the owner of the goods, might have maintained the action. But the defendant is either bound by the contract originally, or not bound: if he is bound, it does not matter by whom the action is brought, so that it is a party entitled to enforce the contract by action; and this was the view taken by the learned Judge at the trial. But there is no need to contest the cases cited. Here the memorandum was not signed by the auctioneer, who sues, but by another party,

(*a*) But see *Kenworthy v. Schofield*, 2 B. & C. 945.

(*b*) 2 Campb. 203.

(*c*) 5 B. & A. 355.

Pill,

Pitt, who signed the contract by the defendant's immediate authority. If it is rightly held, that a contracting party cannot be the agent to sign under section 17., that restriction will surely not be extended to his clerk. The Court here called upon

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against
BOULTER.

Ludlow Serjt. and Justice, *contra*. To decide in favour of the plaintiff, the Court must over-rule *Farebrother v. Simmons* (a). It is not disputed, that, if *Smith* had sued, an entry by the auctioneer would have been a sufficient memorandum to bind the purchaser; so also would an entry by his clerk. In *Henderson v. Barnewall* (b), *Hullock B.* observed, that "an auctioneer's clerk, who writes down the name of the buyer in his presence, is the agent of both parties." But then, whether the auctioneer or the clerk sign, the same objection arises, that the memorandum is signed by one of the contracting parties, who is plaintiff in the suit; for the clerk's signature is that of his master. [*Littledale J.* Then you would say, that an auctioneer can, in no case, bring an action like this in his own name.] He is not obliged to sue; the vendor may. If the auctioneer makes himself the plaintiff, he must take the consequent disadvantages. [*Taunton J.* May not the vendor have two agents; one to extol the commodity, the other to do the mechanical work of making the memorandum in the sale-book?] The latter is an essential part of the auctioneer's duty; the clerk, in doing it, represents him; and it was proved in this case, that *Pitt* was the clerk and servant of *Bird*. His receipt for money would have been that of *Bird*, and

(a) 5 B. & A. 333.

(b) 1 Y. & J. 389.

would

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would have charged *Bird* and not *Pitt* himself, *Edden v. Read* (a). The auctioneer, in this case, on knocking down the lot, says, "It is Mr. *Boulter's*" (the defendant); and the clerk writes; that is, in effect, that the auctioneer writes by the hand of his clerk. If not, where is the memorandum by an *agent lawfully authorized*? for there was no attempt at the trial to establish a distinct agency in the clerk. And if the signature is to be made available as that of the auctioneer given by the hand of his clerk, *Wright v. Dannah* (b) and *Farebrother v. Simmons* (c) apply. [*Patteson J.* In *Blore v. Sutton* (d) the signature of an agent's clerk acting for and under the direction of the agent, in a case within sect. 4. of the statute, was held not to be a memorandum by the authorized agent of the principal.] The dictum of *Hullock B.* in *Henderson v. Barnewall* (e) contradicts this. [*Patteson J.* That was not called for by the case before the Court.] In a sale by auction the knocking down constitutes the contract; the entry is a requisite superadded by the statute, but it is not a distinct transaction. [*Littledale J.* May it not be said that the clerk is constituted a deputy by all the room?] He goes to the sale in a definite character, hired to act for a particular master; he could not sue any other person for work and labour; and the auctioneer might sue for labour done by his clerk. The clerk acts as a mere automaton under the direction of the auctioneer.

DENMAN C. J. I think this case is distinguishable from *Wright v. Dannah* (g) and *Farebrother v. Sim-*

(a) 3 Camp. 339.

(b) 2 Camp. 203.

(c) 5 B. & A. 333.

(d) 3 Mer. 237. See *Coles v. Trecothick*, 9 Ves. jun. 235.

(e) 1 Y. & J. 389.

(g) 2 Camp. 203.

mons(a); and it appears to me that the clerk was not acting merely as an automaton, but as a person known to all engaged in the sale, and employed by any who told him to put down his name. Without, therefore, interfering with the cases that have been cited, I think this rule must be discharged.

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LITTLEDALE J. With respect to the cases relied upon in support of the rule, there is certainly a difficulty in saying that a purchaser shall be bound by a contract or not, as the action is brought by one party or another. It is, indeed, irregular that the real buyer or real seller should make the other party his agent to sign a memorandum under the statute; but when that is done through a third person the objection is removed. An auctioneer is enabled by law to sue the purchaser, but, according to the rule insisted upon for the defendant, an action of this kind could not be maintained by the auctioneer. I think that a clerk employed as *Pitt* was in this case, must, in an action brought by the auctioneer, be considered as his agent for the purpose of taking down the names, and also as the agent of the several persons in the room for the same purpose, and to prevent the necessity of each purchaser coming to the table to make the entry for himself.

TAUNTON J. I very much agree with my Brother *Littledale* as to the difficulty in *Farebrother v. Simmons(a)*. But there is no necessity to overrule that case. The Chief Justice there says, in the close of his judgment, “*Wright v. Dannah* fortifies the conclusion at which I have arrived, viz. that the agent contem-

(a) 5 B. & A. 333.

plated

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plated by the legislature, who is to bind a defendant by his signature, must be some third person, and not the other contracting party on the record." It is a sufficient distinction between that case and this, that in the former the auctioneer, whose signature was relied upon, was the party suing; here the signature is by a third person. I would, however, go farther than this. Under the circumstances, I think *Pitt* may be considered to have been the agent of the vendor. It is not necessary to suppose that the vendor rested a particular confidence in the auctioneer for the purpose of putting down the names in the sale-book. He may be taken to have constituted that person his agent for the making of such entries, whom the auctioneer might choose to appoint. If so, *Pitt* was agent for the vendor, and also for the persons in the room who saw him acting as he did under the auctioneer, and by their acquiescence constituted him their agent for the business which they saw him performing. At all events he is a third person, and not a contracting party on the record.

PATTESON J. It is not necessary here to overrule *Farebrother v. Simmons* (a). It may be correct to say, as there laid down, that the signature must be by a third person, and not by a contracting party on the record. Here it was so. According to the evidence, *Pitt* was seen by all the parties at the sale making the entries in the sale-book; it was inconvenient that each purchaser should come to the table for that purpose, and, by nodding as the names were called, they authorized him to act as he did.

Rule discharged.

(a) 5 B. & A. 333.

1839.

HENS WORTH *against* FOWKES.Tuesday,
January 22d.

DECLARATION stated that the plaintiff complained of the defendant being in the custody, &c. of a plea of trespass on the case; it then alleged that the plaintiff had not ever been guilty, or until, &c. been suspected, of felony, or of having stolen goods concealed upon his premises, by means whereof he had deservedly obtained the good opinion, &c. and was acquiring great profits in his trade of a butcher, yet the defendant contriving and maliciously intending to injure the plaintiff in his good name, &c. and to cause his dwelling-house to be searched for stolen goods, and also to cause him to be imprisoned and detained in prison for a long time, and to oppress and ruin him in his business and otherwise, theretofore, to wit on the 3d of *May* 1832, at, &c. went and appeared before one *C. G. M.*, a justice of peace for the county of *Leicester*, and falsely and maliciously, and without any reasonable or probable cause whatsoever, charged and alleged that certain cart-wheels, the property of the defendant, had by some person or persons unknown been feloniously stolen, and that he, the

Declaration
("in a plea of
trespass on
the case,")
stated that the
defendant, in-
tending to
injure the
plaintiff in his
good name,
and to cause
his dwelling-
house to be
searched for
stolen goods,
and to procure
him to be im-
prisoned, went
before a justice,
and falsely,
maliciously,
and without
probable cause,
charged that
certain specified
goods of de-
fendant had
been feloniously
stolen, and that
he suspected
that the said
goods were
concealed in
the plaintiff's
dwelling-
house; and
upon such
charge the de-

fendant procured the justice to grant a warrant, authorizing a constable, with necessary assistance, to enter the plaintiff's house to search for the *said* goods; and the defendant, with other persons, caused and procured the dwelling-house of the plaintiff to be searched and rummaged for the *said* goods by such persons, and the door of such house and a pantry there to be broken to pieces, and the plaintiff and his family to be disturbed in possession, and his goods to be carried away. The general conclusion was, that by means of the premises, the plaintiff was injured in his good name and trade, put to expence, and hindered in his business. A count in trover was added:

Held, on general demurrer, by *Taunton* and *Patteson* Js., *Littledale* J. dissentiente, that the acts of violence alleged to have been committed in the house, appeared sufficiently by the declaration to have been acts done in pursuance of the warrant, and in consequence of the charge made by the defendant, and that they were stated as mere matter of aggravation; and consequently that the whole count containing this statement was in case.

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against
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defendant, had probable cause to suspect, and did suspect, that the said goods were concealed in the dwelling-house of the plaintiff, and *upon such charge* the defendant then and there falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said justice to make and grant his warrant under his hand and seal, thereby authorizing and requiring a certain constable, to whom the warrant was directed, with necessary assistance, to enter in the day time into the said dwelling-house of the plaintiff, there to search for the *said* goods, and if the same should be found on such search, to bring them, and also the body of the plaintiff, before the said *C. G. M.*, &c.; and the said defendant, with other persons, then and there falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the dwelling-house of the plaintiff to be searched and rummaged for the *said* goods by the said defendant (*a*) and the said other persons, and the door of the said dwelling-house, of great value, to wit, &c. to be with force and arms, &c. broken to pieces, damaged, and spoiled, and also a certain pantry of and belonging to the said dwelling-house, of great value, to wit, &c. to be demolished and broken; and also then and there caused and procured the plaintiff and his family to be greatly disturbed and disquieted in the possession of his said dwelling-house, and divers goods and chattels, to wit, certain cart wheels, of the plaintiff, of the value, &c., to be taken and carried away therefrom; and the said defendant further contriving, &c., on the 5th of *May* 1832, falsely and maliciously, and without any reasonable or probable cause, procured the said warrant to be

(*a*) So in the declaration : see p. 459. *post*.

indorsed

indorsed by *G. B. H.*, a justice of the borough of *Leicester*, and thereby caused and procured the said *G. B. H.* to authorize the execution of the warrant in the said borough, and falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the plaintiff to be arrested and kept in custody, and to be afterwards carried and conveyed in custody before two justices of the borough, to be examined touching the said supposed crime; whereas, in truth and in fact, there were no stolen goods whatsoever in or upon the said premises of the plaintiff, nor was the plaintiff guilty of any such supposed offence; and the said last-mentioned justices, having heard and considered all that the defendant could say against the plaintiff touching the said supposed offence, adjudged that the plaintiff was not guilty thereof, and caused him to be acquitted and discharged of the same, and the defendant had not further prosecuted his said complaint, but had abandoned the same, and the said prosecution was wholly determined. There were other counts not materially varying from the first, and there was the following general conclusion: — “ By means of which said several premises the plaintiff hath been and is greatly injured in his said credit and reputation, and brought into public scandal, &c., with and amongst all his neighbours and other good and worthy subjects of this kingdom, and divers of those neighbours and subjects to whom his innocence in the premises was unknown, have, on occasion of the premises, suspected and believed that he has been and is guilty of felony, and of having had stolen goods concealed on his premises, and also the plaintiff has by means of the premises, suffered great anxiety and pain of body and mind, and

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against
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 ———
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 against
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has laid out 100*l.* in defending himself in the premises, and in the manifestation of his innocence, and has been hindered from following his lawful business for the space of two days, and has been injured in his trade and otherwise.” There was also a count in trover. To this declaration the defendant demurred generally.

White in support of the demurrer. The allegations in the first count of the declaration, that the defendant caused and procured the dwelling-house of the plaintiff to be searched, the door to be broken, &c., and a pantry to be demolished, and the plaintiff to be disturbed and disquieted in his possession, and the goods and chattels of the plaintiff to be taken and carried away, and that he caused the plaintiff to be arrested and kept in custody, are substantive charges of direct and immediate acts of trespass committed by the defendant: they are improperly joined with the rest of the first count, which is in case, and with the count in trover. Trespass and case cannot be joined. The distinction between case for a malicious prosecution, and trespass for false imprisonment, is pointed out by Lord *Mansfield* and Lord *Loughborough* in *Johnstone v. Sutton* (a), and *Ashhurst* and *Buller* Js. in *Morgan v. Hughes* (b). The declaration here does not allege that when the defendant caused the plaintiff’s dwelling-house to be entered and searched, the parties entering and searching acted under or in obedience to the warrant. The several acts there charged, are wholly unconnected with the preceding matter. It is not even alleged that the constable was present, or that the acts were done in his aid. That being so, the

(a) 1 *T. R.* 544.

(b) 2 *T. R.* 231.

injuries

injuries alleged to have been committed after the application for a warrant, are manifestly trespasses. *Bracegirdle v. Orford* (a) shews, that trespass for breaking and entering the plaintiff's dwelling-house, may be well laid to have been done under a false charge and assertion that the plaintiff had stolen property in her house, per quod she was injured in her credit, &c.; for then the false charge is laid only as matter of aggravation; and the jury may give damages for the trespass as aggravated by such false charge. [*Patteson* J. There is a word of reference here to connect the acts done on the plaintiff's premises with the previous matter. It is alleged that the defendant caused the house to be rummaged for the *said* goods.] The parties may have searched the house for the said goods, but unless that was done in obedience to the warrant, or the persons making the search were acting in aid of the constable, it was a trespass. And assuming that they acted under the warrant, they would not be thereby justified in demolishing the door and pantry, *Flewster v. Royle* (b) shews that a party who procures another to be imprisoned is a trespasser. The defendant here is charged with being a trespasser, when it is stated that he procured the plaintiff's house to be searched.

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R. V. Richards, *contra*. Trespass and case undoubtedly cannot be joined; but the first count is framed entirely in case. That appears from the formal commencement, from the inducement to that count, which is founded on a supposed injury to the plaintiff's credit and reputation, and from the conclusion, in which the damages are claimed for the same injury. The breaking and

(a) 2 M. & S. 77.

(b) 1 Campb. 187.

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rummaging the plaintiff's dwelling-house for the *said* goods, must, by necessary implication, be taken to have been done by virtue of the warrant, which is alleged to have been granted on the charge made by the defendant; and, if so, the plaintiff could only have declared in case for the injuries committed in his dwelling-house, and for the arrest, because they were the consequences of that false and malicious charge. Perhaps some of the matters stated might, per se, have been laid in trespass, but they are stated here only as matter of aggravation. In *Elsee v. Smith* (a) (in Error), the declaration stated, that the defendant below went before a justice, and complained that he had reason to suspect that several trees had been stolen, and were carried to the premises of *Smith*, and there concealed, and prayed a search-warrant, and caused and procured the justice to grant such warrant; and that by virtue and under colour of such warrant, the defendant proceeded with a constable to a place near the premises of *Smith*, and falsely and maliciously, and without probable cause, pointed out certain pieces of wood near the said premises, as oak timber suspected to be feloniously stolen; and under colour and pretence of the warrant, caused the wood to be seized without any reasonable or probable cause, and caused the plaintiff to be arrested. Error was assigned, that the remedy was trespass and not case. But the Court held, that the matter charged was properly the subject of an action on the case, because, looking to the whole declaration, the inducement and the matters charged in the conclusion, it was manifest that the plaintiff sought to recover damages for the injury done to his reputation, and not merely for the taking of his goods. So, here, looking to the whole declaration,

(a) 2 Chitty's Rep. 304.

and

and not to particular parts only, it is manifest that the plaintiff seeks to recover damages principally for the injury to his character in consequence of the false and malicious charge, and not for the violence committed in his house, and the imprisonment. It is alleged here, that the defendant procured the house to be searched for the *said* goods; that must mean the goods suspected to have been stolen, and which were included in the warrant obtained on the charge made by the defendant. *Bracegirdle v. Orford* (a) is the reverse of this case; there, the trespass was laid as the substantive cause of action; and the false charge, that the plaintiff had stolen property in his house, as matter of aggravation only. Here, the false and malicious charge is the cause of the action; and the trespass is laid as matter of aggravation. A man may sue alone for trespass in breaking his house and assaulting his wife, the assault being laid merely as aggravation, *Dix v. Brookes* (b). Assuming that the breaking and rummaging the plaintiff's dwelling-house, taken per se, was the subject of an action of trespass, the plaintiff may waive the trespass and bring case for the consequential injury to his reputation, *Branscomb v. Bridges* (c), *Pitts v. Gaince* (d), *Burchell v. Hornsby* (e), *Hall v. Pickard* (g). [Taunton J. Your argument would go this length, that if a man be assaulted he may waive the trespass and bring case; and then if he obtain one shilling damages, he will be entitled to costs.] The true distinction is, that if there be no ground of action except the trespass, case will not lie; but where an actual damage has been sustained in consequence, the trespass

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(a) 2 M. & S. 77.

(b) 1 Stra. 61.

(c) 1 B. & C. 145.

(d) 1 Salk. 10.

(e) 1 Campb. 360.

(g) 5 Campb. 187.

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may be waived and case brought. That seems to have been the opinion of *Holroyd J.* in *Moreton v. Hardern* (a). Where a wrongful taking of goods is a trespass, as well as a conversion, the owner of the goods may waive the trespass and bring trover. Here it appears from the whole of the count, the commencement, the inducement, and the conclusion, that certain damages had arisen to the plaintiff by all the acts mentioned in the declaration: and that the obtaining of the warrant was the original act from which all those damages arose. The injury then, which is the consequence of that act is the subject of an action on the case. Besides, the alleged irregularity in this count is no ground of general demurrer to the whole declaration, *Judin v. Samuel* (b): the objection, being to the particular count, should have been taken advantage of by special demurrer to that count, as in *Orton v. Butler* (c).

White, in reply. Misjoinder of counts, where it is apparent, is a ground of general demurrer to the declaration. *Brigden v. Parkes* (d), *Ashby v. Ashby* (e). In *Samuel v. Judin*, in Error (g), where there was such a demurrer to the whole declaration, Lord *Ellenborough* said that the pleadings and judgment were right, “*unless it could be shewn that the two last counts were laid in assumpsit*, so that they could not be joined with the first count in trover.” Here the first count is shewn to be in trespass, while another is in case. It is not generally true that where the substantive cause of action is a trespass, and there is a consequent damage ensuing from it, a party

(a) 4 B. & C. 223.

(c) 5 B. & A. 652.

(e) 7 B. & C. 444.

(b) 1 N. R. 43.

(d) 2 B. & P. 424.

(g) 6 East, 333.

may

may waive trespass and bring case. Trover is maintainable for a wrongful taking of goods, because that is a conversion as well as a trespass. But assuming that the party might waive the trespass, and bring case for the consequential injury, he must frame his declaration so as to make the consequential injury the gist of the action, and state the trespass as mere matter of aggravation. Here the plaintiff has not done so, because the trespasses are wholly unconnected with the malicious charge made before the magistrate, which would be the proper subject of an action on the case. In *Elsee v. Smith* (a) every thing that would otherwise have been trespass, was alleged to have been done under colour and pretence of the warrant.

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LITLEDALE J. (b). I am rather disposed to think that this demurrer is well founded, because the injuries stated to have been committed in the plaintiff's dwelling-house are not sufficiently alleged to have been done under or in obedience to the warrant, or in aid of the constable. If the declaration had stated that the constable entered, and that the defendant and others in his aid did the several acts, it might have been sufficient. It is argued that the averment of the defendant having caused the house of the plaintiff to be rummaged for the *said* goods, sufficiently connects the acts alleged to have been done in the plaintiff's dwelling-house with the previous matter. I think it does not, because it is consistent with every thing alleged in the count that the defendant may have gone for the warrant, and may afterwards have entered the house with his own friends, but without any constable, and done the acts alleged; or if he caused the acts to be

(a) 2 Chitty's Rep. 304.

(b) Denman C. J. was absent in consequence of a domestic affliction.

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done, it is the same (in legal effect) as if he did them himself. The same observation applies to the allegations respecting the arrest. And if, as I think, it does not sufficiently appear from the declaration, that the acts alleged to have been done in the plaintiff's house were done in execution of the warrant, it follows that they were the subject of an action of trespass. I do not accede to the general position, that whenever there is a trespass, and also a consequential damage, the plaintiff may, at his election, waive the trespass and sue in case. If that were so, whenever there is an assault and a consequent injury, the party might adopt this course, and so entitle himself to costs if he recovered only one shilling damages (a). But here, at all events, there is no cause of action independent of the proceedings subsequent to obtaining the warrant; the mere complaint before the magistrate, as here alleged, would not be sufficient; and the subsequent proceedings, not being connected with the warrant, are the subject of an action of trespass, not case. There can be no doubt that misjoinder of action is a good ground of general demurrer.

TAUNTON J. I have entertained some doubt during the argument, but on the whole I think that the allegations as to *causing the plaintiff's house to be searched and rummaged for the said goods, breaking the door and pantry, &c.* though sounding in trespass, may, by reason of the words *upon such charge*, which occur a few lines before, be considered as importing that the acts alleged to have been done, were done in pursuance of the warrant previously stated to have issued at the

(a) See 2 Vin. Abr. Actions, M. c. 6. *Bourden v. Alloway*, 11 Mod. 180.

instance of the defendant; and, then, the whole cause of action set forth in the first count is in case. The count alleges "that the defendant went before a justice, and, without any reasonable or probable cause, charged that he suspected that goods feloniously stolen were concealed in the plaintiff's house, and, *upon such charge*, caused the justice to grant a warrant." Now it can not be denied that, *so far*, the count is properly framed in case. Then, after setting out the warrant, it proceeds in continuation of the same sentence thus:—"And the defendant maliciously, &c. caused the plaintiff's dwelling-house to be searched and rummaged for the *said* goods by the defendant" (probably a mistake for constable) "and the said other persons." The words "*maliciously and without probable cause*," are improperly introduced here, and may be rejected. The words *said goods* clearly import the goods mentioned in the warrant, and I consider the words *upon such charge* to apply to this latter part of the sentence, which is to be read as if they were repeated in it. If the searching and rummaging for the said goods, breaking the door and pantry, &c. were acts *bonâ fide* done in the course of executing the warrant, they clearly are not the subject of an action of trespass. Proof that the parties did those acts in execution of the warrant, *bonâ fide* believing them necessary for that purpose, would be an answer to such an action. Those acts, however, may be properly laid as matter of aggravation in an action on the case for maliciously and without probable cause procuring the warrant to be granted. The same observation applies to the arrest. The count alleges that the defendant caused the warrant to be indorsed by a borough magistrate, so as to authorize its execution within the borough of *Leicester*, and caused the plaintiff to be arrested

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arrested there. Putting all the allegations together, I consider the words “*upon such charge*,” as applying not only to the defendant’s causing a justice to grant a warrant, but to his causing the plaintiff’s dwelling-house to be searched and rummaged for the said goods, and also to what followed. The count gives the history of the proceedings which took place upon the defendant’s application for a warrant, and I think it no overstrained construction to say, that every thing stated after the words “*upon such charge*,” may be taken to have been done in pursuance of the charge. It is also material that the plaintiff, by the general conclusion of the count, claims damages not merely in respect of the improper violence committed in his house, but of the injury done to his reputation. This is the opinion which I have formed upon hearing the argument, but I give it with diffidence, after the doubts expressed by my brother *Littledale*. It is perfectly clear that a misjoinder may be taken advantage of, either on error or in arrest of judgment, and, à fortiori, on general demurrer. I do not agree to the general position stated in argument, that wherever there is a substantive trespass, and also a consequential injury arising from it, the party may waive the trespass, and bring case. If that doctrine be pushed to the extent contended for, it will be impossible to keep up a distinct boundary, which it is very important to preserve, between those forms of action.

PATTESON J. I have had some doubts on this point, but on the whole I think there is no misjoinder. If there were, there is no question that it might be taken advantage of, either on error, in arrest of judgment, or on general demurrer. (a) In *Orton v. Butler* (b), all the

(a) See *Corbett v. Packington*, 6 B. & C. 266.

(b) 5 B. & A. 652.

counts were in tort, and one only was demurred to, the ground being that there was a novel attempt in it, to declare, substantially, for money had and received, in a count in tort. But if that count had been framed in assumpsit, the others being in tort, the misjoinder must have been taken advantage of by demurrer to the declaration generally. The whole case here turns on the point of misjoinder; and in considering that question, we must look to the whole count, and not to particular expressions contained in it, to see what really is charged. The charge substantially is, that the defendant maliciously, &c. procured a warrant, and under and in virtue of that warrant (though that is not expressly alleged) caused the house to be entered and searched. I do not mean to say that the count would not have been bad on special demurrer, for not alleging that the acts were done in virtue of the warrant; but I think, on general demurrer, the whole statement must be considered as referable to the proceedings on the warrant, and all the acts done must be taken to have been done under and by virtue of that warrant; and if so, they are a consequence of the false charge, and properly the subject of an action on the case. It has been said that, even if the declaration had averred that the defendant and others committed the acts in the house in obedience to the warrant, they would not have been justified in demolishing the door and the pantry. I apprehend, however, they would, provided such acts of demolition were necessary in order to search for the goods alleged to have been stolen; and here it does not appear that they were unnecessary.

Judgment for the plaintiff.

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Thursday,
January 24th.

BURTON *against* HAWORTH and KING.

2-216 The Court will interfere to discharge a party from arrest, or set aside the bail-bond, where it appears plainly, on the face of the matter, that the arrest was groundless, but not where it would become necessary to try the merits of the case on detailed and contradictory statements in several affidavits.

It is not sufficient ground for such interference, that the defendant, denying that he is indebted, and advancing a number of facts in support of such denial, alleges his belief that the action is brought for the purpose of obtaining from him by intimidation, a release of certain covenants; and states, that the plaintiff, or his attorney in his presence, on being refused such release, a week before the arrest, declared that some strong measure must be adopted against the defendant.

THE plaintiff held the defendants to bail on an affidavit alleging them to be indebted to him in the sum of 6700*l.*, for money paid by him to their use and at their request, and for money lent to them by him. Rules were obtained in the last and present term, calling upon him to shew cause in the case of *Haworth*, why the bail-bond should not be delivered up to be cancelled, on common bail being filed; and in that of *King*, why an exoneretur should not be entered on the bail-piece.

The plaintiff, in *February* 1813, was discharged under the then existing insolvent debtors' act, and the defendants were two of his assignees; none of the others survive. Before and at the time of his insolvency he was possessed of estates in *Canada*, which, in consequence of the particular tenure under which they were held, were considered not to pass with the rest of his property under the act. He had, also before his insolvency, commenced actions, and obtained judgments, in the *Canadian* courts, for injuries to those estates; and at the time of his discharge in 1813, appeals against the judgments were depending before the Privy Council, which were followed by a long course of dispute and litigation in the subsequent years.

It was stated on behalf of the defendants that, in pursuance of the opinion of counsel, and in order to facilitate the sale of the *Canadian* estates for the benefit

of

of the creditors, the assignees, in 1816, executed a deed of disclaimer of their interest in those estates, the insolvent at the same time executing a declaration of trust, by which it was provided that he should stand possessed of the monies arising from the said sale for the benefit of his creditors, and that until the sale, his agent in *Canada* should receive the rents and profits, which, after certain deductions made, were to be applied for the benefit of the said creditors. No sale ever yet took place.

The 6700*l.*, for which the defendants were held to bail, was money advanced by the plaintiff and his agent out of these rents and profits, for the expenses of litigation arising from the above-mentioned judgments, after the insolvency of the plaintiff. He contended that, notwithstanding the declaration of trust, the assignees were answerable to him for these advances; inasmuch as, having taken to the judgments for the benefit of the creditors, they were bound to adopt them with their incumbrances, which he was not legally obliged to provide for after his insolvency, and from the produce of estates not operated upon by the insolvent act: and he maintained that so long as the assignees did not repay him the expenses incurred in respect of these judgments, he had a right to take the proceeds, and reimburse himself. The defendants, on the other hand, insisted, that the said sum of 6700*l.* had been received by the plaintiff as trustee for them and his other creditors, pursuant to the declaration of trust; and consequently that the above application of it could not form any ground for a claim of debt against the defendants.

It was further stated on behalf of *King*, that at a
meeting

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meeting of the creditors in *November* 1832, about a week before the defendants were held to bail, the plaintiff was present with his attorney, and proposed to abandon the claim which he alleged he had upon the proceeds of the judgments, if the assignees would release him from the covenants in the trust-deed, which being refused, the plaintiff's attorney intimated that some strong measure would be adopted against the two assignees. The defendant, *King*, in his affidavit, stated his belief that the action was brought with a view of inducing the assignees, by intimidation, to give such release. The plaintiff, in answer, denied having made the above proposal.

Both the defendants denied being indebted to the plaintiff. *King* alleged, on the contrary, that a balance of 200*l.* was due to him; and *Haworth*, that the plaintiff's debt to him at the time of the insolvency was 7000*l.*, none of which had been recovered. The affidavits in which the case on behalf of each party in the two suits was stated, went into much detail, and were of considerable length.

Sir *James Scarlett*, *F. Pollock*, and *Hutchinson*, now shewed cause. This is not a case for the summary interference of the Court. The estates in *Canada* did not pass by the assignment in 1813, and the defendants had disclaimed any interest in them: the insolvent acts in force when the plaintiff was discharged, (52 G. 3. c. 165., 53 G. 3. c. 6.,) did not vest his after-acquired property in the assignees: and, consequently, there is nothing unreasonable in supposing that they may have become indebted to the plaintiff after his insolvency, in the manner

manner alleged. The merits of the two causes must be tried in the ordinary way. In *Chambers v. Bernasconi* (a), which will be relied upon on the other side, an uncertificated bankrupt held his assignees to bail; he could have no property as against them if the commission was valid, and *Tindal* C. J. held it to be unreasonable and injurious that the validity of a commission should be thus brought in question by the single affidavit of the bankrupt. That case differs widely from the present.

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The *Solicitor-General* for *Haworth*, and *Holt* and *Follett* for *King*, *contra*. This is the case of an insolvent who is a cestui que trust, attempting to hold his trustees (the assignees) to bail for money which they have received from the proceeds of the estate and laid out for its benefit, one of the defendants being at this time creditor of the plaintiff for a larger sum than that which he claims. [*Taunton* J. The assignees were not trustees of the future estate of the insolvent, though they were of that which had been vested in the clerk of the peace under the statutes. *Littledale* J. By the acts of 52 & 53 G. 3., the future estate was liable to the insolvent's creditors; it ought, under those acts, to have gone into his hands for the purpose of paying them, not into the hands of the assignees.] The right formerly vested in the insolvent, of carrying the judgments into effect, came to the defendants by the assignment; the produce, if recovered, would not reckon as part of the future, but present, estate. The title of the assignees appears from the affidavits. [*Patteson* J. It is not admitted. 'The whole is matter for a jury.] This is an arrest for the

(a) 6 Bingham. 498.

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purpose of extorting a release of covenants in a trust-deed; and where process is abused the Court will interfere. In *Chambers v. Bernasconi* (a), Tindal C. J. fully recognizes the power of the Courts to control the right of holding to bail; and they will exercise that power where it appears even on the plaintiff's own statement, that he, and not the defendant, is the debtor, *Nizetich v. Bonacich* (b). Here it is evident from the affidavits, without any long deduction, that the plaintiff had no claim against the defendants for money advanced *by him*, as sworn in his affidavit to hold to bail, and that he remained debtor to the defendants. At all events this is a case in which process has been manifestly used by the plaintiff for an oppressive purpose, and to obtain an undue advantage.

LITTLEDALE J. This case comes ultimately to depend on the question, whether or not the process of the Court has been abused in a manner which calls for summary interference. I think that has not been sufficiently shewn. A belief is, indeed, stated, that the action is brought for the purpose of intimidation; but the facts only come to this, that on the assignees refusing to release the covenants in the deed of trust, the plaintiff or his attorney said that some strong measure would be adopted against them. Perhaps they may have said so; and they might think themselves authorized to adopt such measures. That does not shew that the process of the Court has been abused. As to the allegation that the defendants were not indebted to the plaintiffs, but the contrary, that fact ought to appear palpably, on the

(a) 6 Bingham. 498.

(b) 5 B. & A. 904.

very face of the matter, and not by a long detail collected from several affidavits. If there had been a letter of the plaintiff himself acknowledging the fact, as in *Nizetich v. Bonacich* (a), the case would have been different. The rules must be discharged.

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TAUNTON J. The arrest may have proceeded on improper motives, but we cannot try the merits of a cause on affidavits. This is not one of those clear cases, of which *Chambers v. Bernasconi* (b) is an instance, where the Court, unless they shut their eyes, cannot but see that the process has been improperly used, and where, therefore, they are justified in interfering summarily. In *Nizetich v. Bonacich* (a) there was a letter of the plaintiff, acknowledging in one line that the defendant was his creditor. The case lay in a nut-shell. Here it is very different.

PATTESON J. In exercising this power of summary interference, the Court must keep clear of cases where the merits are to be enquired into on complicated affidavits. It is suggested here that the action was brought because the defendants had refused to release certain covenants. Supposing it to be so, I do not know that, if there were a real demand, the Court would set aside proceedings because they originated in a malicious motive. In an action for a malicious arrest, under similar circumstances, the existence of such a motive would clearly not be sufficient.

Rules discharged.

(a) 5 B. & A. 904.

(b) 6 Ling. 498.

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*Thursday,
January 24th.*LYALL and Another *against* LAMB.

An undertaking to indemnify an execution creditor, if he will allow the sheriff to delay selling, cannot be made a rule of court, even by consent, where the person who so undertakes is neither party nor attorney in the suit.

THE defendant's goods having been taken in execution, another party, in consideration that the plaintiffs would allow the sheriff to continue in possession fourteen days, undertook, if the defendant did not pay the debt and costs within that time, and the plaintiffs were obliged to sell, and the goods proved insufficient, to pay the plaintiffs whatever sum should be wanting on such sale: and he consented that such undertaking should be made a rule of Court.

Heaton now moved that the undertaking should be made a rule of Court, but admitted that it was doubtful whether such a rule could be granted, the person who entered into this agreement being neither attorney nor party in the cause depending.

LITTLEDALE J. It is not within the practice of the Court. We have no jurisdiction to make the rule. If the person undertaking had been the attorney it would have been different.

TAUNTON J. concurred.

PATTESON J. If such a rule could be made, to bind persons who are not parties to a cause in Court, there would have been no necessity for the statute 9 & 10 *W. 3. c. 15.*, which enables merchants and traders to make their submission to arbitration a rule of court without action brought.

Rule refused.

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WARDLE *against* NICHOLSON.Friday,
January 25th.

ACTION upon an attorney's bill. At the trial before *Alderson J.*, at the Spring assizes for *Westmoreland*, 1832, the following appeared to be the facts of the case. The goods of one *Barrow* having been distrained for rent, the plaintiff had prepared an assignment of his personal estate and effects to the defendant, in trust for the benefit of his creditors, and by the plaintiff's advice the defendant replevied. The goods remained in the possession of the defendant three weeks; they were advertised for sale, and the plaintiff paid for the printing and posting of the handbills. The plaintiff did not deliver any signed bill to the defendant *before* action brought. After action brought, he delivered a bill of particulars, which contained, after various charges for preparing the assignment and attesting the execution of it, and one for printing and posting hand bills, the following items: —

| | £ | s. | d. |
|---|---|----|-------|
| “The landlord having distrained illegally, attending you and Mr. <i>Graham</i> when it was agreed upon to replevy the goods, and attending for notice of distress | - | - | 0 6 8 |
| Attending Mr. <i>Heeles</i> , (the under sheriff,) and giving instructions | - | - | 0 3 4 |
| Attending and attesting bond | - | - | 0 6 8 |
| Paid Mr. <i>Heeles</i> 's charges | - | - | 2 2 0 |
| Attending to deliver discharge to the officer in possession | - | - | 0 3 4 |
| Paid his fees | - | - | 0 7 6 |

H h 3

Instruc-

An attorney's bill for business done in the county court, is within the statute 2 G. 2. c. 23. s. 23. and must be delivered to the client one month before action brought.

A charge for attesting a replevin bond, is a charge relating to a suit in that court.

An attorney not having delivered any bill to his client *before* action brought, but particulars of demand, containing some taxable items, after action brought, cannot recover for an item not taxable if such item be in respect of business done, or money paid to his client's use, in his character of attorney.

10 ac. 4/3.
6 fine 4/6.

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bill was in part taxable, and all the items were for business done by the plaintiff as an attorney. *Winter v. Payne* (a) will be relied on by the other side, but that case was decided before *Hill v. Humphreys*.

Blackburne contra. As to the point last made, the true distinction is that established by *Mowbray v. Fleming* (b), that where an attorney has delivered no bill to his client before action brought, but a bill of particulars only after action brought, he is entitled to recover items of charge for money paid to his client's use, *having no reference to his business of an attorney*, although other items in the bill of particulars may be taxable. In *Smith v. Taylor* (c), no bill had been delivered by the attorney before action brought. The principal question there was, whether certain items for attendance and advice in a suit, were taxable or not; but the plaintiff had advanced 3*l.* to the defendant, *to discharge costs in that suit*, and it was contended that at all events he was entitled to recover the 3*l.* There was a difference of opinion on the bench whether the former items were taxable or not, but all the Court thought that, if they were, the statute applied, and that the 3*l.* could not be separated from the rest of the demand. Secondly, it is not necessary that the business in respect of which the charges are made should have been done in any court of record. The statute 2 G. 2. c. 23. s. 23., enacts that no attorney, &c. shall commence any suit for the recovery of fees, charges, or disbursements at law or in equity until, &c. Now, business done in the county court is clearly business at law. It has been held that

(a) 6 T. R. 645.

(b) 11 East, 285.

(c) 7 Bingh. 259.

an attorney's bill for business done at the quarter sessions, is within the statute, *Ex parte Williams* (a), *Clarke v. Donovan* (b). In *Balme v. Paver* (c) Lord *Eldon* said, there was nothing that ought to be guarded with so much jealousy as the right of the suitors to have their bills of costs taxed. Thirdly, there were taxable items in this bill. The charge for attesting the replevin bond was, at all events, one. The replevin bond must have been executed after plaint levied, and therefore after a suit in the county court had commenced. A charge for preparing a warrant of attorney has been held to be taxable, *Sandom v. Bourne* (d), and that, although no warrant of attorney was ever executed, *Weld v. Crawford* (e). So a charge for a *dedimus potestatem*, *Ex parte Prichett* (g). Charges for drawing and engrossing an affidavit of debt to hold to bail, and attending to get the party sworn, were held to be charges for business done in court, *Winter v. Payne* (h). So, for attending the defendants' bail, and examining them as to their competency to justify, *Watt v. Collins* (i). In *Ex parte Flint* (k), an attorney who entered a plaint and sued out process in the county court while in prison, was held to be within the meaning of the 12 G. 2. c. 13. s. 9., which enacts, that no attorney, who shall be in gaol, shall sue out any writ or process, or commence or prosecute any action or suit, in any courts of law or equity.

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 against
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(a) 4 T. R. 496.

(c) *Jacob's Rep.* 307.

(e) 2 Stark. N. P. C. 588.

(h) 6 T. R. 645.

(k) 1 B. & C. 254.

(b) 5 T. R. 694.

(d) 4 Campb. 68.

(g) 1 N. R. 266.

(i) 1 Ry. & Moody, 284.

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bill was in part taxable, and all the items were for business done by the plaintiff as an attorney. *Winter v. Payne* (a) will be relied on by the other side, but that case was decided before *Hill v. Humphreys*.

Blackburne contra. As to the point last made, the true distinction is that established by *Mowbray v. Fleming* (b), that where an attorney has delivered no bill to his client before action brought, but a bill of particulars only after action brought, he is entitled to recover items of charge for money paid to his client's use, *having no reference to his business of an attorney*, although other items in the bill of particulars may be taxable. In *Smith v. Taylor* (c), no bill had been delivered by the attorney before action brought. The principal question there was, whether certain items for attendance and advice in a suit, were taxable or not; but the plaintiff had advanced 3*l.* to the defendant, *to discharge costs in that suit*, and it was contended that at all events he was entitled to recover the 3*l.* There was a difference of opinion on the bench whether the former items were taxable or not, but all the Court thought that, if they were, the statute applied, and that the 3*l.* could not be separated from the rest of the demand. Secondly, it is not necessary that the business in respect of which the charges are made should have been done in any court of record. The statute 2 G. 2. c. 23. s. 23., enacts that no attorney, &c. shall commence any suit for the recovery of fees, charges, or disbursements at law or in equity until, &c. Now, business done in the county court is clearly business at law. It has been held that

(a) 6 T. R. 645.

(b) 11 East, 285.

(c) 7 Bingh. 259.

an attorney's bill for business done at the quarter sessions, is within the statute, *Ex parte Williams* (a), *Clarke v. Donovan* (b). In *Balme v. Paver* (c) Lord *Eldon* said, there was nothing that ought to be guarded with so much jealousy as the right of the suitors to have their bills of costs taxed. Thirdly, there were taxable items in this bill. The charge for attesting the replevin bond was, at all events, one. The replevin bond must have been executed after plaint levied, and therefore after a suit in the county court had commenced. A charge for preparing a warrant of attorney has been held to be taxable, *Sandom v. Bourne* (d), and that, although no warrant of attorney was ever executed, *Weld v. Crawford* (e). So a charge for a *dedimus potestatem*, *Ex parte Prichett* (g). Charges for drawing and engrossing an affidavit of debt to hold to bail, and attending to get the party sworn, were held to be charges for business done in court, *Winter v. Payne* (h). So, for attending the defendants' bail, and examining them as to their competency to justify, *Watt v. Collins* (i). In *Ex parte Flint* (k), an attorney who entered a plaint and sued out process in the county court while in prison, was held to be within the meaning of the 12 G. 2. c. 13. s. 9., which enacts, that no attorney, who shall be in gaol, shall sue out any writ or process, or commence or prosecute any action or suit, in any courts of law or equity.

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(a) 4 T. R. 496.

(c) *Jacob's Rep.* 307.

(e) 2 Stark. N. P. C. 588.

(h) 6 T. R. 645.

(k) 1 B. & C. 254.

(b) 5 T. R. 694.

(d) 4 Campb. 68.

(g) 1 N. R. 266.

(i) 1 Ry. & Moody, 284.

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LITTLEDALE J. The rule for entering a nonsuit must be made absolute. The 2 G. 2. c. 23. s. 1. enacts, that no person shall be permitted to act as an attorney in the Court of King's Bench, Common Pleas, or Exchequer, or duchy of *Lancaster*, or in any of his Majesty's courts of great sessions in *Wales*, or in any of the courts of the counties palatine of *Chester*, *Lancaster*, and *Durham*, or in any other court of record in *England* wherein attornies have been accustomably admitted and sworn, unless he shall have been admitted and sworn as therein mentioned. That clause is confined to the courts therein mentioned; but section 23. enacts, "that no *attorney of any of the courts aforesaid* shall commence any action or suit for the recovery of *any fees, charges, or disbursements at law or in equity*, until the expiration of one month or more after the delivery of a bill, &c." That section is not confined to business done in the courts mentioned in the first section; but extends to all fees, charges, &c. either at law or in equity. It has been held to apply to proceedings at quarter sessions. One question here is, whether fees for business done in the county court are to be considered fees, charges, &c. "at law," recoverable by an "attorney of any of the courts aforesaid" within the statute? My brother *Patteson* has referred to the 12 G. 2. c. 13. s. 7., which subjects to a penalty any person who shall commence or defend any action, &c. in the court called the county court, who is not legally admitted an attorney according to the 2 G. 2. c. 23. s. 1. Then, coupling the two enactments together, an attorney who practises in the county court must be an attorney of one of the courts referred to in the 2 G. 2. c. 23. s. 23.; and an attorney seeking to recover
 for

for business done in that court must deliver his bill one month before he commences an action.

Then, was any business done in the county court so as to make the bill taxable? The first charge is: — “The landlord having distrained illegally, attending you, when it was agreed upon to replevy, and attending for notice of distress.” Then “attending Mr. *Heeles*, and giving instructions,” that probably was to enter a plaint. Then, “attending and attesting bond.” Then follows a charge, “attending at the delivery of the goods.” Now, according to the statute of *Marlbridge* (52 H. 3. c. 21.), before the goods are delivered a plaint must be entered. Here, then, the replevin suit must have been commenced, for otherwise the goods would not have been delivered; and this being so, I have no doubt these are charges for business done at law, requiring the delivery of a bill. But, then it is contended that, as no bill was delivered in this case, the plaintiff is entitled to recover in respect of those charges contained in the particulars of demand, which are not the subject of taxation. The distinction upon that subject I take to be this: if it appears by the particulars of demand that all the items are in respect of business done or money advanced by the plaintiff in his character of attorney, all would have been taxable, and the whole bill should have been delivered; but if there be any item for business done, or money advanced by the plaintiff not in that character; (as, if the plaintiff were a banker as well as an attorney, and had advanced money to the defendant in his former character only;) that, not being a taxable item, may be sued for though no bill has been delivered. If, therefore, I could have seen here any charge wholly unconnected with the plaintiff’s character of attorney, I should

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should have thought him entitled to recover in respect of that, but not of other charges. It has been said, that the charge for hand-bills is not connected with his professional character; but, looking to the other parts of the bill, the printing and posting of hand-bills appears manifestly to have been with a view to the sale of the goods for the benefit of the creditors; and, therefore, the money paid for such printing and posting was paid by the plaintiff in his character of attorney. It appears to me, that all the charges may fairly be referred to the plaintiff's employment as attorney, and, consequently, that, not having delivered a bill before action brought, he cannot recover.

TAUNTON J. I am of the same opinion. I entertained a doubt, at one time, whether the items contained in this bill of particulars were charges or disbursements in any court of law or equity within the meaning of the act. I did not then bear in mind the order of proceeding by which a party distrained upon recovers the possession of his goods in a replevin suit. The first step is to levy the plaint, and then the sheriff takes the replevin bond, which is conditioned for the plaintiff to appear at the next county court, and prosecute his suit. The language there used, strongly implies that at the time when such bond is given the suit is in existence; and if a plaint was levied in the county court, that was a proceeding at law, and *attesting* the bond was a matter connected with, and relating to, a suit previously commenced. I cannot distinguish the present case from those where the charge for filling up a bail bond, or engrossing an affidavit to hold to bail, was held to be a taxable item. I therefore think the charge for attesting the replevin bond was a proceeding

ceeding at law within the meaning of the 2 G. 2. c. 23. s. 23. It has been said, that that statute is confined to the courts of record mentioned in the first section; but it has been decided that a bill for business done in the courts of quarter sessions, or in the insolvent court, is within it. *Reynal v. Smith* (a), was determined on the particular language of the 3 Jac. 1. c. 7., which applies only to business done in the courts at *Westminster*. In *Burton v. Chatterton* (b), the affidavit was never sworn; no docket was struck; no proceeding at law or in equity took place. Then, with respect to another point, *Mowbray v. Fleming* (c), shews that where an attorney has not delivered any bill to his client before action brought, he is entitled to recover for money paid by him for his client's use, where such payment has no reference whatever to his business of an attorney. Here all the charges have reference to the plaintiff's business of an attorney.

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PATTESON J. I am of the same opinion. There are two questions: first, whether the charge for attesting the replevin bond related to proceedings commenced in the county court. Looking at the course of proceeding in replevin, I think it did. A replevin may be by a writ at common law, or by plaint, by the statute of *Marlbridge*, which enacts that if the beasts of any person are taken and unjustly detained, the sheriff, *after complaint made to him*, may deliver them without the hinderance or refusal of the person who shall have taken them. Then the statute *Westminster 2.* (13 Ed. 1.) c. 2. requires the sheriff, before he makes deliverance of the distress, to take from the plaintiff pledges not only to prosecute the suit, but also for the return of the beasts, if return be

(a) 2 B. & Ad. 469.

(b) 3 B. & A. 486.

(c) 11 East, 285.

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awarded. And by the statute 1 & 2 *Ph. & M. c.* 12. s. 3., the sheriff is to appoint four deputies with authority to make replevins and deliverance of distresses. The 11 G. 2. c. 19. s. 23. directs how replevin bonds shall be taken, but does not alter the course of the proceeding in a replevin suit. By the statute of *Marlbridge*, therefore, the sheriff was to deliver the goods, after complaint made to him; but, before such delivery, he was required by the statute *Westminster 2.* to take pledges from the plaintiff, and by the statute 11 G. 2. c. 19. s. 23., a bond from the plaintiff and two sureties, in their own names, to prosecute the suit with effect. It is clear then, that, before the bond was given, there must have been a complaint made to the sheriff; and, if so, the charge for attesting the bond was an item relating to a step in the cause in the county court. Then, does the statute 2 G. 2. c. 23. s. 23., apply to proceedings in that court? In *Reynal v. Smith (a)*, the decision turned on the peculiar language of 3 Jac. 1. c. 7. s. 1.; but it seems to me, that the 2 G. 2. c. 23. is not limited to practitioners doing business in courts of record. The words are general, “no attorney or solicitor of the courts aforesaid shall commence any action for fees, charges, &c. at law or in equity.” If a man might practise in a county court without being an attorney of a court of record, there might be some ground for the limitation; but the 12 G. 2. c. 13. s. 7. shews that he cannot. On the other point, I also think that, to recover in respect of the items relied on as not taxable, the plaintiff ought to have shewn that they were unconnected with his character of an attorney. The rule must therefore be absolute.

Rule absolute for entering a nonsuit.

(a) 2 B. & Ad. 469.

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ASSUMPSIT. The declaration stated, that in consideration that the plaintiff would sell the defendant certain stock of the plaintiff, for 600*l.*, to be paid for by approved bills falling due *before* the 15th of *February* 1832; he, defendant, undertook to pay the plaintiff the said sum by approved bills falling due *before* that day.

At the trial before *Denman* C. J., at the sittings after last term, the plaintiff gave in evidence a memorandum in writing signed by the defendant, corresponding with the contract set out in the declaration, except that it stated that the payment was to be by approved bills falling due “*by*” (and not *before*) the 15th of *February*. It was objected, that this was a variance. The Lord Chief Justice was of opinion, that it was a variance which he had power to amend by the statute 9 G. 4. c. 15., and directed the declaration to be amended, by substituting the word *by* for *before*. A verdict was found for the plaintiff for 104*l.* damages, but leave was given to move to enter a nonsuit if the Court should think the amendment not warranted.

Biggs Andrews now moved accordingly. This is not a case within 9 G. 4. c. 15. s. 1. That clause enacts, “that it shall be lawful for any judge sitting at *Nisi Prius*, if he shall see fit so to do, to cause the record on which any trial may be pending before him, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record, to be forthwith amended

in

Declaration 8. 9. 48 - 3. stated, that in 1. 2. 2. - 4. consideration 1. 2. 4. - 1. that the plaintiff would sell goods to the defendant for 600*l.*, to be paid for by approved bills, falling due *before* the 15th of *February* 1832, the defendant undertook to pay plaintiff said sum, by approved bills falling due *before* the said, &c. At the trial the plaintiff proved a written contract, corresponding with that set out in the declaration, except that the payment was to be in approved bills, falling due *by* the 15th of *February*: Held, that although the declaration did not profess to set forth any contract in writing, this variance was amendable by the Judge at *Nisi Prius*, under the statute 9 G. 4. c. 15. s. 1.

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in such particular.” Here, the variance was not of this kind, for there was no recital or setting forth upon the record of any matter in writing or print. In *Ryder v. Malbon* (a), the avowries did not profess to set out any instrument in writing; and a lease was given in evidence to shew that the terms of the holding were different from those alleged on the record: and *Park J.* would not permit the avowries to be amended, saying, that, in his opinion, the statute only applied to cases “where some particular written instrument is professed to be set out or recited in the pleading.” [*Taunton J.* If the plaintiff had declared upon a contract in writing the act would apply. Then is it not absurd to say that it does not apply because the plaintiff has omitted the words “*by agreement in writing*,” which, in pleading, are unnecessary?] The act in terms applies only to cases where a matter in writing is set forth or recited upon the record.

Cur. adv. vult.

DENMAN C. J. in the course of the term said: In *Masterman v. Judson* (b), which was an action for not obeying a subpœna, the Court of Common Pleas, after time taken to consider, held, that a Judge at Nisi Prius, under the statute, might amend the declaration by inserting, instead of “a copy of the writ of subpœna,” “a copy of so much of the writ of subpœna as related to the defendant.” We think that case decides the present, and consequently there must be no rule.

Rule refused.

(a) 3 Car. & P. 595.

(b) 8 Bingh. 224.

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The KING *against* MATTHIAS ATTWOOD, Esquire. *Saturday, January 26th.*

A RULE was obtained in *Trinity* term 1832, calling upon the master and wardens of the *Merchant Tailors' Company*, to shew cause why a mandamus should not issue, commanding them to call a meeting or assembly of the company on the 24th of *June* next ensuing, for the purpose of electing the master and wardens for the subsequent year according to the charters. The application was grounded on affidavits of certain liverymen of the company, who stated that according to the charters, (as they were advised and believed) the whole of the members of the company had the right of electing one master and four wardens thereof *from among themselves* as often as they should please or as should be needful, in manner as they should think best; but that nevertheless the whole government of the company was exercised by a master, wardens, and court of assistants,

On motion for a mandamus to the master and wardens of an incorporated mercantile company of the city of *London*, to call a meeting of the company on the next annual day of election, for the purpose of electing a master and wardens according to the charters, it being suggested as the ground of motion, that the said officers were at present improperly elected by a part only of the company, instead of the wholebody; the Court refused the writ.

On motion afterwards for a quo warranto against the master elected in the manner complained of, it appeared that the practice, as far as it could be traced, from the year 1488, had been for the master, wardens, and a body called the court of assistants (which had varied in number, from twenty-four to forty), to elect the master; and that he had usually been elected out of the court of assistants, and not out of the general body. The assistants, besides belonging to that court, had the same qualifications for being elected as the other members of the company. In some instances, but it was not stated how many or when, persons had been elected who were not of the court. The company had existed from time immemorial; by a charter of *Rich. 2.* they were empowered to elect a master *de æipsis* when and as they should please; and by a charter of 18 *Hen. 7.* (1502) all their liberties, franchises, and customs, were confirmed:

Held, that if one entire by-law were to be presumed, for the master, wardens, &c. to elect, and to elect out of a restricted body, the latter part of such by-law would be bad, and vitiate the whole, but that no ground was laid for presuming such by-law, inasmuch as the elections from the particular body might have been made in every instance by choice, and not under any rule; and further, it appeared that there were exceptions, although these were not specifically stated; and that even the practice of electing *by* a limited body was not necessarily to be presumed part of a by-law, as it might have been a custom, incorporated by reference in the charter of *Hen. 7.*

Quære, Whether a quo warranto information lies at the instance of a private relator, against a person claiming to hold an office in one of the incorporated mercantile companies of the city of *London*?

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not elected by the fraternity, but usurping those offices : that the master and wardens were not elected by the general body, but by the said master, wardens, and assistants : and that they, when requested by the present applicants and other liverymen, had refused to point out to them, or allow them to inspect, the by law, if any, by which the present mode of election was established ; or to call a meeting of the fraternity for the purpose of enquiring into the existence of such regulation, and considering the propriety of repealing it if extant. Affidavits in answer were put in, one of which was by the clerk of the company, stating that he had examined the records of the election of master and wardens of the company which are extant from 1488 to 1493, from 1562 to 1663, and from 1672 to the present time ; and that during all those periods the master and wardens had been elected by the master, wardens, and court of assistants (a). In the same term (*Trinity*, 1832),

Sir *James Scarlett*, *Campbell*, *Coleridge*, and *Follett*, shewed cause. If the application is well founded, the last elections are void, and the proper remedy is by quo warranto. But the Court will not decide, upon what is now alleged, that a practice of 340 years' standing is invalid : they will rather presume that it is founded on a by-law no longer extant. In *Rex v. The Mayor and Citizens of Chester* (b), a case resembling this, the Court refused a mandamus, observing that another remedy was open : and there were there two instances of elections varying from the long usage relied upon in opposition to the rule. An application like this was made in the

(a) See *Rex v. The Merchant Tailors' Company*, 2 B. & Ad. 115.

(b) 1 M. & S. 101.

case of the *Patten Makers'* Company, previously to the motion for a quo warranto to the master (a), and the Court immediately discharged the rule.

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Denman, Attorney-General, *F. Pollock*, and *Hoggins*, contra. A by-law may be presumed, but there must be facts to raise that presumption. The matters here stated have, upon the whole, the contrary effect. It is true there would have been no difficulty in applying for a quo warranto; but as the parties, in consequence of the delay in furnishing information, could not proceed till the offices were near expiring, it was more convenient to ask the Court for a mandamus, than put the officer to defend rights which had so short a time to exist. In the *Patten Makers'* case, the objection to a mandamus was, that the application was made many months beforehand, and it was possible that the parties might proceed to election in a regular manner. Here they have been called upon and refuse to do so, and the time is at hand.

LORD TENTERDEN C. J. If the master and wardens have been improperly elected, the proper and reasonable course is an application for a quo warranto. The Court refused a mandamus in *Rex v. The Mayor of Chester* (b), and in the *Patten Makers'* case; and there is no instance mentioned in which the writ has been granted under such circumstances. We think, therefore, we ought to discharge the rule, leaving it to the parties, if they think proper, to apply for a quo warranto.

(a) As to the latter motion, see *Rex v. Bumstead*, 2 B. & Ad. 699.

(b) 1 M. & S. 101.

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We had doubts when we granted the rule, and perhaps ought not to have done so.

PARKE J. (a). There are two objections to this rule, assuming the application to be well founded; first, we do not know that the parties will not proceed regularly on the day of election; and, secondly, the mandamus, if granted, must be addressed to persons who are not really officers.

TAUNTON J. concurred.

Rule discharged.

In the ensuing *Michaelmas* term a rule was obtained calling upon *Matthias Attwood*, Esq., to shew cause why a quo warranto information should not be exhibited requiring him to shew by what authority he claimed to be master of the Merchant Tailors' Company. The grounds stated were, that he was not legally elected, agreeably to the charters; nor according to any legal by-law; nor according to any legal uniform usage; nor according to law. On cause being shewn against the motion in this term (*January 15th*), the Court held that the grounds of the application were not sufficiently stated in the rule, but leave was given to amend; and the grounds, as stated in the amended rule, were:—

1. That the said *M. A.* was not legally elected, agreeably to the existing charters of King *Henry VII.*, and those therein recited, which direct that the whole fraternity shall elect a master from amongst themselves.

2. That he was not elected by the fraternity from

(a) *Littledale J.* was in the bail court. *Patteson J.* at Guildhall.

amongst

amongst themselves, but by a portion or committee of the whole from themselves, who are self-elected and fluctuating and uncertain in their number.

3. That this mode of electing a master is repugnant to and inconsistent with the directions of the said charters, and narrows the electors by an unreasonable restriction.

4. That the persons eligible are thereby narrowed.

5. That the said *M. A.* was elected master according to a usage observed by the said company, that a portion of the whole fraternity, called the Court of Assistants, shall elect the master from themselves, which is inconsistent with the directions of the said charters.

6. and 7. That no by-law, or legal usage, authorizes the mode of election by which the defendant was nominated master.

8. That the nomination of the defendant is inconsistent with the spirit and direction of the said charters, which intended the appointment to that office to vest in all the members of the company from out of themselves.

9. That the nomination is illegal and void, as made by a portion or committee of the whole fraternity, indefinite, and regulated by no by-law or uniform usage.

10. That the said *M. A.* was not elected according to the charters, having been elected by a select body out of a select body; that, in point of fact, there is no by-law which directs and sanctions such a mode of election; and if there be such a by-law in fact, it is illegal.

The affidavits in support of the rule set forth the same matter as before, respecting the right of election under the charters: they then stated that the Court of Assistants consisted, at that time, of thirty-nine persons only, including the master and wardens; that the master and wardens were elected by the Court from among them-

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selves, without reference to the rest of the fraternity (a); that their number was uncertain and varying; that the other members of the company were not permitted to see the accounts, records, and ordinances of the said company; that the oath administered to a liveryman on his admission required that he should not (being in *London*, and in good health) absent himself from the feast holden yearly about *Midsummer*, because he would not bear the office, room, and charge of a master or warden; that the master and wardens levied fines upon the freemen on admission to their livery, and increased them at their pleasure; that the said *M. A.* was elected out of the Court of Assistants; that the liverymen are never called together for any purpose connected with the election of the master and officers, or the administration of, or examination into, the funds and affairs of the company; and that certain freemen and liverymen had

(a) In the affidavit of one of the applicants, Mr. *R. H. Franks*, the statement on this head was as follows: — “That in an affidavit of *J. B. De Mole*, clerk to the said master and wardens, sworn on the 3d of *January* 1831, and filed in this Honourable Court on opposing a rule for a mandamus to inspect the records of the said company,” (see 2 *B. & Ad.* 115.) “the said *J. B. De Mole* hath sworn, that from the date of the earliest documents in the possession of the said master and wardens, down to the present time, a period of 340 years and upwards, there appears to have existed in the said company a certain body, varying in number, but not falling below twenty-four, called assistants or councillors, the members of which appear to have been from the earliest period, and still are past-masters and others, elected from the liverymen or freemen of the said fraternity; and that the right of election of the said master and wardens appears from the earliest period in which any evidence can be procured on the subject, to have been for 340 years last past and upwards, and still is, in the said corporation of master and wardens and the said assistants so elected as above mentioned.

“That he (*R. H. Franks*) has made considerable enquiry and investigation, and that during the said period of 340 years, the usage has been for the master, wardens, and assistants to elect the master from out of the Court of Assistants, and not out of the fraternity at large.”

applied

applied to the master and wardens for liberty to inspect the by-laws and other documents, but had been refused.

In opposition to the rule, Mr. *De Mole*, the clerk of the company, stated as before, that he had examined the records of the company during the periods mentioned in his former affidavit, as to the election of master, and that it nowhere appeared in those records that the fraternity at large, or any members, being merely freemen or liverymen, were ever summoned to, or took part in, or were present at, such election, but that the master, wardens, and court of assistants were the only persons who appeared to have attended and taken part in the same; that the Court of Assistants is a body elected from the freemen and liverymen, the members continuing freemen and liverymen after their election; and that the court appears to have existed from the earliest times; that during the periods aforesaid the master and wardens have always, at the time of their election, been freemen of the company, and members of the fraternity at large, but not always members of the Court of Assistants—it appearing by the said records that freemen have been elected to the office of master who were not at the time, and do not appear to have been, and were not (as deponent believed), at any time before such their election, members of that court; that the said *M. A.* was a freeman and liveryman at the time of his election, and was duly elected by the master, wardens, and assistants (being past-masters) of the said company, according to the custom which had existed, as the deponent believed, for 340 years and upwards; that the company was a corporation, both by prescription and by charters; and that by a charter of 18 *H.* 7. that king

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confirmed to the then master and wardens of the company all their then existing privileges and franchises, as their predecessors had been reasonably accustomed to use and enjoy the same; and deponent believed that the present custom, as to the election of master, had been lawfully established before, and existed at the time of granting that charter; that the present number of freemen, as nearly as the deponent could calculate, was from 1000 to 1100, of whom from 320 to 340 were also liverymen; that a large number of the freemen were very indigent, many of them receiving pensions or occasional relief from the company, and that a meeting of the whole, for the purpose of electing a master and wardens (if they could be summoned) would produce much inconvenience, without corresponding benefit; that the charities and trusts under the management of the master and wardens, which were numerous and important, had been entrusted to them, as deponent believed, by persons acquainted with the constitution and mode of government of the company, as it had existed for the last three centuries and upwards, and, in some instances at least, upon the faith thereof; that the number of the Court of Assistants is limited to forty, and has not, during the last 340 years (as is believed), fallen below twenty-four; that when the number is below forty, wardens are elected from the body of the freemen, and are shortly afterwards chosen members of the court; but when the court is full, the wardens are elected from among its members, to avoid increasing the number; that the said *M. A.* was elected master by the master, wardens, and assistants of the company, being past-masters, according, as the deponent believed, to immemorial usage, and that on no occasion, during the last 340 years, as the deponent believed,

believed, had any other persons taken part in such elections. There were other affidavits on the same side; and a verified copy of the charter of 18 *H.* 7. (the governing charter of the company) was also put in, referring, by *inspeximus*, to previous charters of 1 *Edw.* 3., 14 *Rich.* 2., 9 *H.* 4., 18 *H.* 6., and 5 *Edw.* 4.

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The charter of 1 *Edward* III., (exemplified under the great seal in 15 *Edw.* III.) after reciting that the Tailors and Linen Armourers of *London* had petitioned the king and his council in parliament for the confirmation of a certain annual guild immemorially held by them for the regulation of their trade, confirmed such guild accordingly, with authority to the men of the said mysteries, and their successors, to order and regulate the same, and to correct the faults of their servants of the same mysteries, by the view of the mayor of the said city for the time, &c., *et per probiores et magis sufficientes homines de misteris illis*; “and that no one should hold a counter or shop of the said mysteries within the liberty of the city aforesaid, unless he be of the freedom of that city; nor shall any one be admitted to the said freedom, unless it shall be testified by the honest and lawful men of the said mysteries that he is honest, faithful, and fit for the same.” *Richard* II. confirmed the above charter, and the good customs and usages touching the said guild, not expressed in the said charter, and which they had used in the said city from time immemorial; and he further granted to the said tailors and linen armourers that they and their successors “*habere, tenere et exercere possint gildam prædictam et fraternitatem dictorum scissorum, &c. aliarumque personarum quas ipsi recipere voluerint in fraternitatem prædictam, ac eligere, habere et facere possint unum magistrum et quatuor custodes de seipsis quotiens*

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quotiens eis placuerit vel opus fuerit pro gubernatione, custodia et regimine fraternitatis prædictæ in perpetuum, prout melius sibi placuerit," &c. And that the said master and wardens "adventus et congregationes suos in locis civitatis prædictæ eis pertinentibus facere possint," and might there in an honest manner keep their feast on the festival of *St. John the Baptist*, "et ibidem facere ordinationes inter ipsos, prout sibi viderint magis necessarias et opportunas, pro meliori gubernatione fraternitatis prædictæ in perpetuum, prout ipsi ante hæc à longo tempore facere consueverunt." By the charter of *Henry IV.*, the former charters were confirmed to the then master and wardens by name, and it was further granted, on the petition of the said master and wardens, that they and their successors should be perpetui et capaces, and that the fraternity should be solida, perpetua et incorporata; that the fraternity should be called the Fraternity of Tailors and Linen Armourers of *St. John the Baptist* in the City of *London*; and that the said master and wardens should be called the Master and Wardens of the said Fraternity of tailors, &c.: and the said master and wardens and their successors, and also the fraternity aforesaid, were, by the said charter, incorporated for ever and made as one body; and they were to have a common seal, and to plead and be impleaded by the name of the Master and Wardens of the Fraternity of, &c. And the King further granted to the said master and wardens to have and hold to them and their successors for ever all the lands, tenements, annuities, and other possessions whatsoever, acquired by them or their predecessors, or by any others, before that time, by the name of the tailors and linen armourers, &c., or by the name of the fraternity, or of the master and wardens of the fraternity, of *St.*

John

John the Baptist, &c., or by any other name whatsoever, to the use (ad opus) of the tailors and linen armourers, or of the fraternity: and the King ratified and confirmed the possession of the same to the said master and wardens and their successors, the statute of Mortmain, &c., or any forfeiture notwithstanding. *Henry VI.* confirmed the above charters to the then master and wardens by name, by the advice of the lords spiritual and temporal in parliament, and added other privileges which it is not material to state. *Edward IV.*, on the petition of the then master and wardens, ratified and confirmed the above charters to them by name.

Henry VII., by the advice and consent of the lords spiritual and temporal in parliament holden in the first year of his reign, confirmed the above charters to the then master and wardens by name, and their successors, “prout iidem magister et custodes eis uti debent et solent, ipsique et prædecessores sui libertatibus et franchisesiis illis a tempore confectionis literarum prædictarum semper hactenus rationabiliter uti et gaudere consueverunt:” and by charter in the eighteenth year of his reign, that king confirmed the preceding charters to the then master and wardens and their successors, by name, prout, &c. (as before): and, being informed that the men of the said mysteries, or at least sanior pars eorundem, had from time whereof, &c., traded, and still did trade, in various parts of the world, to the honour of the realm, &c., and especially had used the buying and selling of woollen cloths throughout the realm, and particularly in *London*, the king transferred and changed the said guild or fraternity into the name of the guild of *Merchant Tailors* of the fraternity of *St. John the Baptist* in the city of *London*;
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and the master and wardens, and their successors, into the name of Master and Wardens of the guild of, &c., and incorporated the said guild, and the said master and wardens and their successors, by the said new names respectively; and gave power to the said master and wardens to augment the said fraternity and receive persons into the same: “ Et quod dicti magister et gardiani, &c., et successores sui, habeant, teneant, possideant et gaudeant eis et successoribus suis omnia et omnimoda terras, &c., et alia hereditamenta et alias possessiones quascunque ac bona et catalla quæcunque, necnon *omnia et omnimoda libertates, franchisesias, privilegia et consuetudines* quæ et quas magister et custodes dictæ gildæ sive fraternitatis scissorum et linearum armaturarum armorarium, &c., *tempore confectionis præsentium habuerunt, aut ipsi vel prædecessores sui, sive homines prædictarum misterarum, ante hæc tempora habuerunt,* possederunt sive tenuerunt, seu eis, vel eorum alicui, aut dictæ gildæ sive fraternitati, ante hæc tempora concessa seu indulta fuerunt.” The master and wardens were further empowered to make and execute statutes and ordinances for the government, &c., of the said mysteries, and of the men of the said fraternity and mysteries, according to the exigency, as often as need should be, so that they were not contrary to the laws and customs of *England*, or in prejudice of the mayor of *London*. No one was to use the art or mystery of the Merchant Tailors, &c. in the city, unless admitted thereto by the master and wardens. Other privileges were given, which it is unnecessary to state.

The *Solicitor-General*, Sir James Scarlett, Coleridge Serjt., and *Follett* shewed cause in the present term.

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In the first place, this, being an office in a private company, is not one of those for which by the statute 9 *Ann. c. 20.* an information in the nature of a quo warranto lies at the instance of a private relator. The master of the Merchant Tailors' Company does not, if improperly appointed, usurp any right of the crown. He is merely the head of a voluntary association, and his office relates only to the administering of charities belonging to that society, and to the regulating of the trade with which their body is connected. It is no more the subject of a quo warranto than an office in the College of Physicians, or in one of the inns of court. It does not concern the administration of justice, the protection of the peace, or the acquisition or exercise of any political right. It is true that members of this company admitted to their livery are entitled to vote for the city of *London*; but that is not a right communicated by the master in that capacity. Apprenticeship entitles to freedom, but the right is not communicated by the master to the apprentice, nor does his situation relatively to the apprentice make him liable to a quo warranto. If, indeed, an information were moved for to oblige Mr. *Attwood* to shew why he claimed to act as a liveryman of *London*, the case would be different. Many chambers which now confer a vote for the city of *London*, are at the disposal of the societies of the *Inner* and *Middle Temple*; but could a quo warranto information be on that account exhibited against an officer, the treasurer for instance, of one of those societies, even supposing it were a body corporate? The title and preamble of the statute 9 *Ann. c. 20.*, as well as the words of sect. 4., shew that the enactment in that section giving power to private persons to exhibit quo warranto informations for
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the usurping of offices, relates only to offices in cities, towns corporate, boroughs, "and places" of a like description: and this is confirmed by the language of 32 G. 3. c. 58. s. 1., which enables the defendant to any such information for the exercise of an office or franchise "in any city, borough, or town corporate" to plead that he has held such office six years. It was decided in *Rex v. Wallis* (a), that "places" in the former act must mean places ejusdem generis with those previously named: and in *Horn v. The Cutlers' Company* (b), that the powers given by that statute did not extend to the case of a private company. [*Taunton J.* referred to *Rex v. Highmore* (c).] That case is explained by *Rex v. M'Kay* (d), where it was held that the statute of *Anne* applied only to corporate offices in corporate places. [*Patteson J.* In *Rex v. The Duke of Bedford* (e), the Court made a rule absolute for a quo warranto information against the duke as claiming to be governor of the company of conservators of *Bedford Level*. That, however, was at common law, before the statute of *Anne*.] In *Rex v. Bumstead* (g), such an information was granted against an individual claiming to be master of the *Patten Makers' Company*, but the present objection was not taken. [*Patteson J.* It was in *Rex v. The Duke of Bedford* (e), without success.] An information of this kind could not be filed independently of the statute of *Anne*, by a private relator. In 2 *Selw. N. P.* p. 1152. 8th edit., it is stated, that before the statute a private person could not interpose in quo warranto, the Crown only, by the Attorney-General,

(a) 5 T. R. 375.

(b) 2 *Selw. N. P.* 1152. note (k).

(c) 5 B. & A. 771.

(d) 5 B. & C. 640.

(e) 1 *Barnard. K. B.* 242. 280.

(g) 2 B. & Ad. 699.

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being competent to do so; and authority is given in support of that position; though, on the other hand, Mr. *Tancred* in his work on *quo warranto*, p. 15. states it to be beyond a doubt (and assigns grounds for that opinion) that before the statute of *Anne* the coroner did exhibit such informations at the suggestion of private persons. But at all events, if this case is unquestionably not within the statute, the Court will not refer to any supposed common law right, but will leave the matter to the Attorney-General, who, if an office of this kind is abused, or its trusts, charitable or otherwise, unfulfilled, may proceed against the party in this Court or in Chancery.

Then passing by this objection, the words of the charter of *Rich. 2.* are, that the fraternity of tailors and linen armourers and their successors “*eligere, habere et facere possint unum magistrum, &c., de seipsis, quotiens eis placuerit, vel opus fuerit, pro gubernatione, &c., prout melius sibi placuerit.*” Now, in *Rex v. The Mayor of Chester* (a), where there was a similar latitude in the words of the charter (“*singulis annis successivis eligere possint*”) and the usage had not been to elect annually, Lord *Ellenborough* said that the Court would not interfere against a long continued usage upon words of a charter which were in any degree doubtful. The usage here called in question has existed, at all events, ever since 1488; and where the words of a charter admit of doubt, usage is a proper guide to the construction, *Gape v. Handley* (b). The next charter, that of *Hen. 4.* grants to the then master and wardens to be *perpetui et capaces*, gives them a distinct incorporation,

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(a) 1 M. & S. 101.

(b) 3 T. R. 288. n. (a).

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and vests in them and their successors all the lands, tenements, annuities, and possessions which they or the fraternity, by whatsoever name, ever before had. The charter of *Hen. 7.* is granted by the advice and consent of the lords spiritual and temporal in parliament, and is, therefore, in effect, a statute of the realm, *The Prince's Case (a)*: the omission of the Commons is no proof to the contrary in a private act, if it be found on the parliament roll, as may be proved by many instances. This charter incorporates the company by a new name, still keeping separate the master and wardens from the body at large, and it confers on the master and wardens, and their successors, all their former possessions and rights, and all the liberties, franchises, privileges, and customs, which the master and wardens of the said fraternity of tailors or linen armourers, or their predecessors, or the men of the said mysteries before then had. Now it is quite clear that the custom, as to the election of master, subsisted long before the date of this charter; whatever, therefore, its commencement may have been, the charter confirms it.

Supposing even that the charter of *Rich. 2.* gave the right of election to all the fraternity, liverymen and freemen, it is settled by many cases that the members of a corporation may, by a by-law, vest that right in a more limited number, if they do not exclude any integral part of the body, or introduce any stranger, *Case of Corporations (b)*, *Rex v. Ashwell (c)*, *Rex v. Westwood (d)*. Though the number of the select body be indefinite or varying, that is not, of itself, any objection, *Golding v. Fenn (e)*.

(a) 8 Rep. 20.

(b) 4 Rep. 776.

(c) 12 East, 22.

(d) 7 Bingh. 1.

(e) 7 B. & C. 765.

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And if such a by-law may legally be made, its existence at a former period may be presumed, where records are defective, and the usage has been very long established, though the by-law itself may have been lost by time, *Rex v. Head* (a), *Rex v. Ashwell* (b), *Rex v. Bird* (c). Even sixty years' usage has been considered evidence of a by-law, *Perkin v. The Master, &c. of the Cutlers' Company* (d).

But an attempt is made to shew that the by-law, supposing it to exist, narrows not only the number of electors, but that of the persons eligible; in which case, according to a distinction perhaps of modern origin, but which cannot now be contested, the whole by-law (taking it to be one and entire) would be invalid. But the affidavit on the other side, in which a former affidavit of Mr. *De Mole* is cited, does not establish this. It appears that the court of assistants elect, but not that they are necessarily the body elected from. On the contrary, it is stated that the practice in this respect has not been invariable. And if it had, it does not follow that any by-law has limited the number of persons eligible. All may be eligible, and yet in practice it may uniformly have been found most convenient to choose from a certain class, who were likely to be most eminent in the fraternity, and best acquainted with its affairs. The court of assistants are all freemen, and need no by-law to render them eligible. Mr. *Attwood* is a member of the body at large, as well as of the court of assistants; he has all the qualifications which would entitle him to be chosen if the election were made from among the whole. It will not, therefore, be presumed that he is

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(a) 4 Burr. 2515.

(b) 12 East, 22.

(c) 13 East, 367.

(d) 2 Selw. N. P. 1172. (8th edit.) from Serjt. Hill's MSS.

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elected by reason of something vicious in a by-law otherwise good. The affidavits on the other side do not state that any person has ever been rejected as ineligible because he was not a member of the court. All, therefore, that is justly to be presumed with respect to a by-law is, that it reduced, as it legally might, the body of electors; but not that it went the length of restricting, contrary to the general law, the number of persons eligible.

The oath taken by the liverymen, not to absent themselves from the annual feast for the purpose of avoiding the office and charge of a master and warden, can make no difference; because every freeman is eligible to the office of warden, and may, therefore, in any view of the case, become master. No substantial ground, therefore, is laid for this application, supposing it admissible in point of law; and, as was said by *Abbott C. J.* in *Rex v. Haythorne (a)*, if there be no reasonable doubt, the court will not, on trivial grounds, set on'foot a proceeding which may disturb a very great and important corporation.

F. Pollock and *Hoggins*, contra. First, as to the power of the court to grant a quo warranto in this case, that point is decided, not only by *Rex v. Bumstead (b)*, but by *Rex v. Wakelin (c)*, where the Court made a rule absolute for an information calling on a party to shew by what authority he claimed to be a member of the Company of Tailors in *Lichfield*. In *Rex v. Jolliffe (d)*, there was a quo warranto information for claiming to exercise the office of mayor of *Petersfield*, which is not a corporate town. It is no answer to say that in those

(a) 5 B. & C. 429.

(c) 1 B. & Ad. 50.

(b) 2 B. & Ad. 699.

(d) 2 B. & C. 54.

cases the objection now urged was not taken ; and it is to be observed, that the motion for a mandamus in the present case was resisted, and disposed of, on the ground that an application to the Court for a quo warranto was the proper course.

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The question then is, what is the true effect of the charters by which this corporation is governed. And it is to be wished that in former cases the Court had paid less regard to usage, and considered more what was required by the language of charters, and the rights which the subject derived from them. The language of the charter of *Rich. 2.* is perfectly plain : that the said tailors and linen armourers and their successors “ shall be enabled to exercise the guild and fraternity of the said tailors and armourers of linen armoury, and of other persons whom they may be willing to receive into the aforesaid fraternity, and shall be able to elect, have, and make, one master and four wardens from amongst themselves so often as they shall please,” &c. But it is said, that a usage has prevailed from which the Court must presume a by-law, narrowing the rights of election ; and that that by-law is not now to be called in question ; in support of which latter proposition *Rex v. The Mayor of Chester* (a) was cited. There, however, the application for a mandamus was refused mainly on the ground that another remedy was open, namely, by quo warranto. In *Rex v. Ashwell* (b), the alleged by-law was submitted to a jury, who found in favour of it. Lord *Ellenborough* observed there, that long continuance of a by-law would not legalize it if it were in itself illegal. In *Rex v. Westwood* (c), a quo warranto was

(a) 1 M. & S. 101.

(b) 12 East, 22.

(c) 4 B. & C. 781. 7 Bingham, 1.

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granted, and the by-law came in question on demurrer; the Judges of this Court differed in opinion respecting it, and on error brought, it was only after a considerable lapse of time that the House of Lords declared it valid, some of the Judges being still of a different opinion. In *Rex v. Bird* (a), the information was granted in the first instance. These cases shew that the disposition of the Court in late times has not been to preclude enquiry into such by-laws and usages by refusing informations: and in the present case, if any doubt arises, the question ought to be submitted to a jury.

It is essential to the validity of a by-law that it be not contradictory or repugnant to the charter, 2 *Selw. N. P.* 1170. 8th edit., which it clearly is if it limit the number of persons eligible; or if it vary the description of such persons, *Lee v. Wallis* (b). Even where this is not the case, the Court may enquire whether the practice which prevails is founded on a just construction of the charter. The body making by-laws cannot unreasonably narrow the number of electors, nor impose a qualification unwarranted by the charter, *Rex v. Spencer* (c). Here both objections arise. As was said in *Rex v. Spencer*, the select body “have restrained the electors, not generally, but with such a distinction as in effect places the election in themselves (d).” The number of electors is narrowed here from 1100 to at most forty, and that a fluctuating and indefinite body: and the qualification is added, of being a past master. The charter directs that the fraternity shall elect *de seipsis*; the by-law establishes a select body, who elect themselves and elect out of themselves.

(a) 13 *East*, 367.(b) 1 *Lord Kenyon's Notes*, 292.(c) 3 *Burr.* 1827.(d) *Ibid.* 1635.

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It is said, that the election by the limited body out of themselves is not part of the by-law, and that, in fact, masters have been elected who were not at the time members of the court of assistants. But the affidavit does not specify the instances, their number, or date: they may even have been before the making of the supposed by-law. It stands, therefore, without any substantial contradiction, that the usage has been for this body to elect, and also to elect from among themselves: if a by-law is to be inferred from usage, it must be collected from the whole usage—the vicious part as well as the sound; they have no right to separate one from the other; or if any question arises whether or not the practice has in fact been vicious, or whether the by-law is to be connected with that vicious practice, or only with so much of the custom as is valid, those points ought to be submitted to a jury, and not decided by the Court on this application.

DENMAN C. J. I, for one, should be very sorry to withdraw from the consideration of a jury any case that was properly a subject for their inquiry: and whenever a proper doubt is raised upon any material fact regarding the title of a public officer, this Court, I think, will not hesitate to refer it to the proper tribunal. But, here, I am of opinion that no sufficient case is made out: for, without going into nice distinctions, it ought, at least, to be shewn to the Court, before they allow parties to be subjected to the trouble and expense of such a proceeding as this, that there is some reasonable ground for doubting the title that is called in question. In the present case two objections are raised: first, that the number of electors is improperly limited; secondly, that

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the body of persons eligible is also narrowed by the by-law on which, as it is assumed, the practice, with regard to these elections, must be grounded. But I am not sure that, in this case, the party against whom the application is made would rely on such by-law, or need do so. The first objection is certainly not a valid one in point of law, unless clear grounds can be shewn for saying that the limitation of the electing body was unreasonable. In *Rex v. Spencer* (a), it did so appear; but the present case is not brought within that; and it is perfectly understood as law, that a mere limitation of the number of electors is not in itself any objection to a by-law. The other point taken, namely, that the body elected from is narrowed, would undoubtedly be fatal to any by-law, though found by a jury to have existed; but it does not strike me that that objection is raised, even by the affidavit of Mr. *Franks*, when that is properly sifted. It is stated by him that the elections have, for a great length of time, been made out of a certain class; but the distinction is so obvious between a limitation of the known number of electors, and a practice of electing out of a limited class, the motives for which election cannot in each instance be known, that it does not appear how any mistake can arise between one and the other. It is sworn, also, that there have been exceptions to the latter practice; and, under these circumstances, I should think it most unreasonable to presume the existence of a by-law corresponding with that practice. This was the only doubt upon which the Court would have been inclined to pause; and as we all think, on examining the affidavits, that this doubt

(a) 3 Burr. 1827.

is not sufficiently raised, there is no *primâ facie* case to warrant us in calling these gentlemen to further question.

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LITTLEDALE J. The charter of *Rich. 2.* empowers the fraternity to elect a master and warden *de seipsis*, but does not prescribe the mode. For that we must refer to the usage. Now the usage, as far back as 1488, appears to have been for the master, wardens, and assistants who had served the office of master, to elect the master. The charter of 18 *Hen. 7.* confirms former usages, and therefore the question is, whether this usage was valid. That the number of electors may be restrained by usage or by-law, was fully admitted in *Rex v. Westwood (a)*; but it is said that the present usage is invalid, because it must be taken altogether as shewn by the practice stated on affidavit, and the effect of the practice is to restrain the number of persons eligible, and prevent the choice from being made out of the general body of freemen. There is no doubt that a usage or by-law having this effect would be bad: the reason given for narrowing the number of electors, namely, the avoiding of confusion, does not apply to it. But here, although the choice has generally been made out of the limited body, it does not follow that the belonging to that body was a necessary qualification. It may be that the master has usually been chosen out of the court of assistants, the members of that body having more experience and knowledge of the affairs of the company than other persons; but there is not enough on the affidavits to shew that this was part of the same

(a) 7 *Bingh.* 1.

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usage which narrowed the number of electors, that both practices commenced at the same time, or that they are to be connected with one and the same by-law.

TAUNTON J. Since the *Case of Corporations* (a), it has almost universally been considered, that a by-law narrowing the number of electors might be supported: but a by-law restricting the number of persons eligible has been always held bad. The Court must not, in the present case, be understood as suggesting even an inclination of opinion that such a by-law could be maintained. But, for the purpose of inducing the Court to grant this rule, an ingenious mode of putting the case has been adopted. It is said that if a doubt exists the question should be sent to a jury: and here, as the affidavits state a uniform practice of electing the master from the court of assistants, which is represented to be a narrowing of the body of persons eligible, an attempt is made to couple this with the practice by which the number of electors has been restrained, and to represent both as one solid, compact body of usage from which the Court is to presume one entire by-law: and it is contended that as this supposed by-law, if bad in one respect, would be bad altogether, sufficient doubt is raised to require the intervention of a jury. But I agree with my Lord and my brother *Littledale*, that the circumstances here do not lead to a necessary inference of any one and entire usage or any by-law of the nature suggested. As to the part which is supposed to limit the number of persons eligible, the practice in that respect does not appear to have been uniform. It is stated

(a) 4 Rep. 77 b.

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(though the affidavit on this subject might possibly have been more explicit), that there have been some exceptions, though it is not said when or in what instances; but upon this statement there is not the same ground for presuming a usage narrowing the number of the eligible, as for inferring a like usage in the case of the electors.

It appears to me, however, that this case may very fairly be decided without reference to any presumed by-law. It may be that, if the case turned upon such a by-law, sufficient uncertainty might exist (such by-law not appearing on the corporation books) to send the question to a jury: though I do not mean to say that in every case where the circumstances raise a strong presumption, the matter must necessarily be sent to a jury. The argument, however, would be forcible, in such a case, in favour of the rule. But in the present case, it appears from the charter of 15 *Edw. 3.*, that this guild existed before the time of legal memory. That dates from a period in the reign of *Rich. 1.*, which was from 1189 to 1199. The next charter, of *Rich. 2.*, confirms not only the charters of *Edw. 3.*, but also the good customs of the guild not therein expressed, and which they have used and enjoyed from time immemorial. So that the company, at these periods, was governed not only by charters, but by customs which had obtained contemporaneously with them. The charter of *Rich. 2.* goes on to confer upon them the liberty of choosing a master and wardens *de seipsis, quotiens eis placuerit, &c., prout melius sibi placuerit.* The mode of election is not prescribed, nor the persons by whom it is to be; in the absence of such direction the common law right of election would be in the whole body; and if there

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there be a custom to the contrary, confirmed afterwards by a charter, such custom is not in derogation of the previous charter, but only of the common law right. The next important charter is that of 18 *Hen. 7.*, which corresponds to the year 1502, 3. Now, it is admitted that the mode of election in dispute here had prevailed from the year 1438; and this, which is an *inspeximus* charter, comprehending within itself all the previous ones, confirms them, and grants, among other things, that the master and wardens there named, and their successors, shall have and enjoy all the liberties, franchises, privileges, and customs which the master and wardens of the fraternity of tailors and linen armourers had at the time of making these presents, or which they or their predecessors have, before this time, possessed or held, or which have been granted to the said guild or fraternity. If, therefore, the usage of electing a master by the master, wardens, and assistants had prevailed before the granting of this charter, it is thereby expressly confirmed. I do not go so far as to say, that this charter, because made with the assent of the lords spiritual and temporal, has the force of an act of parliament. Lord *Coke*, indeed, lays it down that nothing can be so considered unless it appear to have received the triple assent of king, lords, and commons (*a*). I will not say that this grant of *Hen. 7.*, wanting the assent of the commons, is to be looked upon as a statute, but if not a more binding, it is a more solemn and considered instrument than a charter granted *ex mero motu regis*: and as the custom in question existed when it was granted, it may be regarded as incorporating that cus-

(a) *Co. Litt.* 159 b. 4 *Inst.* 25. *The Prince's Case*, 8 *Rep.* 40.

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tom, and regulating the mode in which the election of master was thereafter to be carried on.

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PATTESON J. I agree with my Lord and the rest of the Court, that this rule ought to be discharged. The first objection, that the practice in question narrows the number of electors, is answered by shewing that it has prevailed ever since the year 1488; and whether such usage be referable to a by-law, or to immemorial custom, it is clear that it may have had a legal commencement. I do not agree in the observation which has been made, that it would have been better if this Court had looked more at the terms of charters, and less at the usages that have prevailed. I have always understood the practice of our predecessors to have been to look carefully at usages which have existed for a great length of time, and to refer them to a legal origin if they can have had one: I do not think the reflection upon that practice well founded, and I certainly should not think myself authorized to break through it. As to the second objection, the mere circumstance that the master has been elected from the court of assistants is of no importance, unless it appear that such election is governed by some regulation or by-law which prevents a choice from the body at large; for a member of the Court is not the less a member of the general body. The whole question then is, if there be any such usage? If there were, it is not contended that it would be good: and if there were a reasonable doubt as to its existence, the question ought to go to a jury. But is there any reasonable doubt? I am convinced that there is not, principally upon the grounds already stated by my Lord. The circumstance of a particular body
always

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always electing is clear and notorious, being in derogation of the general right; it cannot have escaped notice, and must be referred to some known by-law or custom. But the practice of electing from a particular body is not necessarily referable to any such law or usage. The parties may have chosen so to elect; but no inference arises that they were bound to do so. I do not think, therefore, that the affidavit of the relator lays sufficient ground for sending this case to a jury; and the affidavits on the other side shew that persons have, in fact, been elected who were not members of the court of assistants. As the Court gives its judgment on these grounds, it is unnecessary to state any opinion on the other point raised, whether or not a quo warranto lies in a case of this description.

Rule discharged, without costs.

Monday,
January 28th.

MARSHALL, Assignee of DAVIS, a Bankrupt,
against BARKWORTH.

7th
The act 1 &
2 W. 4. c. 53.
s. 42. does not
give validity to
commissions of
bankrupt
founded on
concerted acts
of bankruptcy;
and, therefore,
the execution
of a deed,
whereby a
trader assigns
all his pro-
perty to a
trustee for the benefit of all his creditors, is not an act of bankruptcy sufficient to support a commission founded on the petition of a creditor who was either party or privy to such deed.

TROVER. Plea not guilty. At the trial before Alderson J., at the Spring assizes for the county of York, 1832, it appeared that the bankrupt, being indebted to Messrs. Raikes and Co., had given them a warrant of attorney, upon which judgment had been entered up by *nil dicit*, and a *fi. fa.* indorsed to levy 1036*l.* issued on the 3d of June 1831; and on that day the defendant, the sheriff of Hull, seized the goods of the

1 Dec. 544.

bankrupt.

bankrupt. At the time when the sheriff's officer entered, *Davis*, the bankrupt, observed that it would be better for him to commit an act of bankruptcy, to secure the property to his general creditors. *Woolley*, the bankrupt's attorney, who was present, objected to this, saying that he should suffer by it. On the 6th of *June*, however, *Davis* executed an assignment of all his property to a trustee, for the benefit of his creditors. It was proved that, between the 3d and 6th, *Woolley* had been seen in *London*, in company with the plaintiff, who was afterwards the petitioning creditor; and the case for the defendant was, that *Woolley* had been induced by the plaintiff to forego his objection, and concur in *Davis's* becoming bankrupt. The assignment was the act of bankruptcy relied upon in support of the commission, which issued on the 9th of *June*. The goods were sold by the sheriff between the 9th and the 20th.

The learned Judge told the jury to find for the defendant, if, upon the evidence, they thought that the act of bankruptcy was concerted with the petitioning creditor; otherwise, for the plaintiff. The jury having found for the defendant, a rule *nisi* was obtained for a new trial, on the ground of misdirection.

F. Pollock, Archbold, and Cresswell now shewed cause. The question is, whether an assignment by a trader of all his goods, made for the purpose of founding a commission on it, be an act of bankruptcy. The concert between the petitioning creditor and the bankrupt is a fraud upon the policy of the bankrupt law, and makes the assignment void. The statute 6 G. 4. c. 16. s. 3. enacts, that if any trader there mentioned shall make "any fraudulent grant or conveyance of any of his lands, tenements,

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ments, goods, &c., or any fraudulent gift of any of his goods, with intent to defeat or delay his creditors, he shall be deemed to have thereby committed an act of bankruptcy." Here the assignment was not made with an intent to defeat or delay the creditors of the bankrupt, but that it might be used for the purpose of procuring a commission to be issued. It is not, therefore, an act of bankruptcy within the words of the statute. The fact of the act of bankruptcy having been concerted between the petitioning creditor and the bankrupt, is not only a ground upon which the Court of Review would supersede the commission, but it makes a commission founded on such act of bankruptcy bad in a court of law. In *Shaw v. Williams* (a), Lord Tenterden C.J. said such an act was no act of bankruptcy. Where such an assignment constitutes an act of bankruptcy, it is because it is fraudulent; but a party who assents to it is estopped from saying that it is so. The validity of the commission depends on the right of the creditor to petition: and a party who has signed such a deed cannot, as petitioning creditor, set it up as an act of bankruptcy: *Bach v. Gooch* (b), *Bamford v. Baron* (c), *Prosser v. Smith* (d), *Ex parte Harcourt* (e), *Tope v. Hockin* (g), *Ex parte Gane* (h), *Tappenden v. Burgess* (i). Then, the only act of bankruptcy proved in this case being one concerted between the bankrupt and petitioning creditor, the commission cannot be supported. It may be said the law has been altered by 1 & 2 W. 4. c. 56. s. 42., which enacts, that from and after the passing of that act, no commission of bankrupt shall be superseded, nor

(a) *Ryan & Moody*, 19.

(c) 2 T. R. 594. n. a.

(e) 2 Rose, 213.

(h) 1 Mont. & M'Arthur, 399.

(b) 4 Camp. 252.

(d) Holt N. P. C. 442.

(g) 7 B. & C. 101.

(i) 4 East, 2 : C.

any

any fiat annulled, nor any adjudication reversed, by reason only that the commission, fiat, or adjudication has been concerted by and between the petitioning creditor and the bankrupt, except where any petition to supersede a commission for any such cause shall have been already presented, and shall be then pending. But that clearly applies only to cases where the *commission, fiat, or adjudication* has been concerted between the petitioning creditor and the bankrupt. It leaves the law, as to concerted acts of bankruptcy, just as it was before.

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Wightman contra. *Davis* committed an act of bankruptcy by assigning all his effects, because he thereby deprived himself of the means of carrying on his trade. Such an assignment by a trader may be either fraudulent upon the creditors, or may be fraudulent only as contravening the policy of the bankrupt statutes. A person who is privy to a fraudulent assignment of the first description cannot set it up as an act of bankruptcy; but if a party procure an assignment of the latter description, he may. In *Back v. Gooch* (as reported in *Holt's* N. P. C. 13.), the assignment appears to have been to trustees, for creditors whose debts respectively amounted to 30*l.* In *Tope v. Hockin* (a), it does not appear what the trusts were. Here the assignment was made for the purpose of causing an equal distribution of the bankrupt's effects among all his creditors. It is therefore to be referred to an act of duty rather than of fraud, when no purpose of fraud is proved; as was laid down by Lord *Ellenborough*, in *Pickstock v. Lyster* (b). Then the 1 & 2 *W. 4. c. 56. s. 42.* applies *in terms* to

(a) 7 *B. & C.* 101.(b) 3 *M. & S.* 371.

concerted

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concerted commissions only, but, by construction, must extend to all things necessary to support the commission. Construing it liberally, it must mean that, in all cases where the commission was formerly liable to be superseded on the ground of concert, it should no longer continue so.

DENMAN C. J. Before the late statute 1 and 2 *W. 4. c. 56. s. 42.*, the act of bankruptcy relied upon in this case could not have been set up by the petitioning creditor, or by any other creditor who was a party, or privy to the deed of assignment. The question is, whether that act has made any difference in the law. It appears to me that it has studiously avoided doing so, and that it leaves concerted acts of bankruptcy as they were before. I take it to be clear, that where the thing done as an act of bankruptcy is done by concert with a particular creditor, he cannot afterwards come into court and set that up as an act of bankruptcy. The fraud is not as to him, but as to the creditors generally; the intent to delay them gives it the character of fraud. The stat. 6 *G. 4. c. 16. ss. 6. & 7.*, as to concerted declarations of insolvency, raises a strong inference that all other concerted acts of bankruptcy were at that time considered as rendering a commission invalid.

LITTLEDALE J. A party colluding with a bankrupt, who commits an act of bankruptcy for the purpose of founding a commission upon it, does it with some view of benefit to himself, and the law will not allow him to ground a commission on such an act of bankruptcy. The 6 *G. 4. c. 16. s. 6.* enacts, that a declaration of insolvency left at the Bankrupt Office and duly advertised,
shall

shall be an act of bankruptcy ; and s. 7. provides, “ that no commission under which the adjudication shall be grounded on the act of bankruptcy, being the filing of such declaration, shall be deemed invalid by reason of such declaration having been concerted or agreed upon between the bankrupt and any creditor or other person.” I think it is fairly to be inferred from that enactment, that every other act of bankruptcy so concerted or agreed upon was to be invalid ; and I am therefore of opinion that in this case, the act of bankruptcy, having been concerted between the bankrupt and petitioning creditor, will not support the commission.

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TAUNTON J. I am of the same opinion. This deed of assignment purports to be executed for one purpose, and a party to it endeavours to make it enure to another. He cannot so avail himself of his own fraud.

PATTESON J. Independently of the bankrupt act, an assignment for the benefit of all the creditors would not have been fraudulent ; *Pickstock v. Lyster* (a). But *Bamford v. Baron* (b) and *Back v. Gooch* (c), decide that such a deed, though intended for the benefit of the creditors at large, cannot be used by one who is party or privy to it, as an act of bankruptcy whereon to found a commission. In both those cases the deeds were for the benefit of *all* the creditors, and not fraudulent in themselves. The stat. 1 & 2 W. 4 c. 56. s. 42. applies only to concerted commissions, fiats, or adjudications. If the legislature had intended to include concerted acts of bankruptcy, it would have referred to them in ex-

(a) 3 M. & S. 371.

(b) 2 T. R. 594. n.

(c) 4 Camp. 232. S. C. Holt's N. P. C. 13.

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press words, as it has in the 6 G. 4. c. 16. s. 7., which renders valid one species of act of bankruptcy, viz. a declaration of insolvency, though concerted between the bankrupt and a creditor. The rule for a new trial must be discharged.

Rule discharged.

Monday,
January 28th.

SAVILLE, and JOYCE, his Wife, *against*
SWEENY.

Declaration, by husband and wife, stated that the wife *lived separate from the husband*, and kept a boarding-house, and enjoyed good credit, and was supplied with necessaries upon credit by tradesmen, both for her own support and for carrying on her said business; that defendant spoke certain words of her, and of and concerning her manner of carrying on her business, imputing to her insolvency, adultery, and prostitution: by reason whereof divers persons left off boarding with her, and tradesmen ceased to supply her on credit, whereby she was injured in her said business, and impoverished, &c.:

CASE by husband and wife, for words spoken of the wife. The declaration, after averments of good conduct and repute, went on to state, that whereas the said *Joyce*, before and at the time of the committing of the grievances after-mentioned, did live separate and apart from her husband, and carry on the trade and business of a boarding-house-keeper, and, for the purpose of carrying on the same, did occupy a certain boarding-house for the board and lodging of divers persons, at a great annual rent, to wit, 100*l.*, payable to one *Charles Pardy*, to wit, at *Southampton*, which boarding-house, before and at the time, &c. had been and was frequented by many good and worthy subjects, &c., for their lodging and boarding: and whereas the said *Joyce*, by her honesty and good conduct had acquired great credit among her neighbours and tradesmen with whom she had any dealings, to wit, one *John Hewitt* and others, and had been and was from time to time supplied by them

upon credit, whereby she was injured in her said business, and impoverished, &c.:

Held, that the wife ought not to have been joined in this action, the words being only actionable in respect of damage to the business, and that damage being solely the husband's.

Whether or not he could have maintained an action under the circumstances, *quære*.

1. S. C. 432.

upon

upon credit with meat, drink, clothes, and other necessities, as well for her own support and maintenance as for carrying on the said boarding-house, by means of which several premises she acquired great gains, and lived in comfort and affluence: yet the defendant, well knowing, &c., but contriving, &c., in a certain conversation which he had with *Charles Pardy*, in the presence of divers other subjects of this realm, of and concerning the said *Joyce*, and of and concerning the said trade and business so carried on and conducted by her as aforesaid, and of and concerning her in the way of her carrying on and conducting the same, spoke and published to the said *Charles Pardy*, in the presence and hearing of the said last mentioned subjects, of and concerning, &c. (as above), these false, malicious, scandalous, and defamatory words following, of and concerning, &c., that is to say: "Oh that vile woman, (meaning the said *Joyce*), her passionate temper and general conduct are so disgusting, she has driven all the ladies out of the house (meaning certain ladies then and there residing, boarding, and lodging in the said boarding-house); you had better get rid of her; I have always paid the rent" (meaning the rent so payable to *C. Pardy* as aforesaid). There were other counts in which different words were set out, imputing to the plaintiff *Joyce* adultery, prostitution, and insolvency; and in some counts the defendant was stated to have said to the above-mentioned *John Hewitt*, of and concerning, &c. "You will never get your money (meaning money due to him from the plaintiff *Joyce* for goods); she left *London* and has not paid her tradespeople there, not even her servant; you are very foolish to trust her." The general conclusion was, that by means thereof the plain-

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4 B. & C. 1 250

tiff *Joyce* was injured in her good name, &c., and the said *Hewitt* and other persons who had from time to time supplied her with necessaries upon credit, had refused any longer to do so, and she had been prevented from carrying on her said business, and living in comfort and affluence as aforesaid, and had been brought to great penury and want. There was a second set of counts, (with a like inducement,) at the end of which it was averred as special damage, that certain persons named, who would otherwise have used and frequented the boarding-house, had declined to do so. A third series applied solely to the loss of credit with tradesmen, whereby she had been prevented both from carrying on her business, and from obtaining necessary sustenance. In the fourth the words were not stated to have been spoken of the plaintiff *Joyce* in her business, nor was she alleged to be living apart from her husband, and the damage laid was that divers persons named, who had associated with her, and gratuitously entertained her in their houses, to the great reduction of her living and maintenance, had refused any longer to do so (a). Plea, not guilty. At the *Hampshire* Spring assizes, 1832, the plaintiff had a verdict, and in the next term *Follett* obtained a rule to shew cause why a nonsuit should not be entered or the judgment arrested. As nothing ultimately turned upon the first point, it is unnecessary to notice it further: the ground for arresting the judgment was, that the gist of the action being pecuniary damage, the husband ought to have sued alone.

Bompas Serjt. and *Sewell*, now shewed cause. This is a case in which the wife was properly joined as a

(a) No evidence was given in support of this averment.

plaintiff,

plaintiff, since the whole cause of action was a wrong suffered by her. If it could be said that the business in question was in any sense the husband's, it was still, in point of fact, so far the wife's as to bring the case within that class in which the wife has been held rightly joined, as being the meritorious cause of action. *Prat v. Taylor* (a), *Brashford v. Buckingham* (b), *Fountain v. Smith* (c), *Philliskirk v. Pluckwell* (d). And where there is an immediate interest of the wife, to which injury is done, the husband and she ought to join in the action to assert her right, *Dunstan v. Burwell* (e), *Weller v. Baker* (g). The rule in cases of tort, where the suffering of the wife is, in fact, the cause of action, is, that the husband may sue alone for the damage resulting to himself, but he may also allege the wrong done to her as the sole cause, and join her as a plaintiff. In *Coleman et Ux. v. Harcourt* (h), which may be relied upon on the other side, it is stated, that the action being case for saying to the wife, *they* (the husband and wife) keeping a victualling-house, "thou art a bawd," &c., by reason whereof *J. S.* forebore the house, to the damage of both, judgment for the plaintiffs was arrested, "because the words are not actionable, except in respect of the special loss, which is the husband's only." There the special damage (for which alone the action lay) was in respect of a business which was the husband's; as appears also by the mention of the same case in 2 *Ld. Ray.* 1032, and the report in 1 *Keb.* 791. Here the trade is, in fact, the wife's only. In *Russell et Ux. v. Corne* (i), one

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(a) *Cro. Eliz.* 61.(c) 2 *Sid.* 128.(e) 1 *Wils.* 224.(h) 1 *Lev.* 140.(b) *Cro. Jac.* 77.(d) 2 *M. & S.* 393.(g) 2 *Wils.* 414.(i) 2 *Ld. Raym.* 1031.

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count was for beating the wife, *per quod* the business of the husband remained undone; and the objection taken to that count was, that the wife could not join for damage accruing to the husband from the loss and delay of business in which she had no interest. But here the wife, in fact, has the whole immediate interest; and her loss of business is the gist of the action. It was held at one time, that a wife separated from her husband by deed might be made bankrupt, *Ex parte Preston* (a); and sued for goods sold, *Ringstead v. Lady Lanesborough* (b); and these cases are even now available to shew that a wife living separate may have such an interest in a business carried on by her, as entitles her to be joined in an action brought by the husband for slandering her in such business. The personal wrong and suffering of the wife are the gist of this action, apart from any ultimate loss which may result to the husband, and which would never be taken into consideration by a jury, in an action brought by him alone, while living separate from his wife. In the case of the dippers at *Tunbridge Wells* (c), the injury was held to be one affecting the right and interest of the wives, with which the husbands had nothing to do, and it was said that both must join. Now in that case, if the wives had been slandered in their occupation, it cannot be said that they ought not to have joined; yet the profits of the business belonged to the husbands. A servant, beaten and disabled, might maintain an action for his own personal suffering, and the master might also sue for the loss of service. So in this case, there is a distinct personal suffering of the

(a) *Cooke's Bankrupt Law*, p. 40. 8th edit.(b) *Ibid.* p. 41.(c) *Weller v. Baker*, 2 *Wils.* 414.

wife,

wife, for which, indeed, she cannot, as the servant could, maintain an action in her own name, but the husband may sue, joining her in the action for that personal suffering, without regard to the ulterior damage accruing to him in consequence. On this view of the case, it is necessary that the wife should join: the husband would else be without remedy, for he could not sue alone. And words, like those in question, when spoken of a person carrying on a business or profession, with reference to such business, will support an action, independently of any specific, consequential damage. *Seaman v. Bigg* (a), *Terry v. Hooper* (b), *Wharton v. Brook* (c).

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Follett, contra. It is unnecessary to say whether or not the husband could sue alone in this case. Possibly there may be no legal remedy. The argument on the other side is, that the whole injury complained of here is personal to the wife. Now the words in themselves are not actionable. It is said, however, that they are so here, simply because spoken of her in a trade or business. But words affecting any one in a trade are actionable on account of the pecuniary injury they occasion; and if no special damage is laid, it is because the pecuniary injury is to be presumed without being stated. That injury, however, in a case like this, must be the husband's. Even as to the loss of sustenance, the injury is his; for he is bound to maintain his wife, at least where there is no regular divorce, or separation by deed. In the cases where it has been said that the wife was the meritorious cause (a term of which it would be

(a) *Cro. Car.* 480.(b) 1 *Lev.* 115.(c) 1 *Ventr.* 21.; and see *Whittington v. Gladwin*, 5 *B. & C.* 180.

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difficult to give a satisfactory explanation) there has been either a direct contract with the wife, or a consideration proceeding from her, or an instrument under seal executed to her: but here the circumstances are entirely different. The doctrine as to joining the wife as the meritorious cause, and cases on that subject, are stated in 1 *Selw. N. P.* 285. note (6), 8th edit.; but this observation is added: "Care, however, must be taken that the declaration does not embrace any other cause of action, accruing to the husband alone; for if it does, it will be bad. *Holmes et Ux. v. Wood*, cited by the Court in *Weller v. Baker*, 2 *Wils.* 424." In *Coleman et Ux. v. Harcourt*(a), the declaration was held bad, because the damage was wholly to the husband. In *Russel et Ux. v. Corne*(b), the action was brought by husband and wife for false imprisonment of the wife, per quod the husband's business remained undone, and it was objected that there being a special damage laid to the husband, he only should have brought the action; but it was held sufficient, because the action for false imprisonment lay at the suit of both, and the adding of matter in aggravation, affecting the husband only, did not render the declaration bad. A like rule may be deduced from other cases on this subject, many of which are collected in a note on *Russel et Ux. v. Corne*, in 1 *Salk.* 119. But in the present case there is no injury at all in respect of which the wife can be joined: the words are not actionable in themselves, and the special damage to the husband is the sole ground of complaint. "Where the action is brought for words in themselves actionable, and no special damage laid, there such conclusion" (*ad damnum ipsorum*) "is right, for the

(a) 1 *Lev.* 140.(b) 2 *Ld. Raym.* 1031. 1 *Salk.* 119.

action survives. *Grove et Ux. v. Hart*, T. 25 G. 2." *Bull. N. P.* 7.: but here the reverse is the case. If the actual damage in this case had been stated in express terms, it would have appeared clearly to be a pecuniary loss to the husband. In 1 *Bac. Abr.* 733. tit. *Baron and Feme* (K.), 6th ed., where several cases on this subject are collected, it is observed, in a marginal note, that "where an action is brought for words spoken of, or other tort done, to the wife, and founded upon the special damage of the husband, she must not join." The case of *Marshall v. Mary Rutton* (a), is an answer to the authorities cited for the purpose of shewing that the wife, in this case, because living alone, has a pecuniary interest in respect of which she can maintain an action; and it is not even alleged here, that the wife is separated by deed, as she was in all those cases. In *Boggett v. Frier* (b), it was held that the husband's desertion of the wife, and absence beyond the seas for four years, during which time she had traded as a feme sole, did not entitle her to maintain trespass for breaking her shop and taking her goods; and *Lewis v. Lee* (c), establishes that even a divorce *a mensâ et thoro* does not place a married woman in the condition of a feme sole, for the purpose of being sued.

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 against
 SWRENT.

LITLEDALÉ J. I am of opinion that the judgment must be arrested; it is therefore unnecessary to say anything on the question as to entering a nonsuit. The declaration states that the female plaintiff was living separate from her husband, and carrying on the business of a boarding-house-keeper, and was supplied with neces-

(a) 8 T. R. 545.

(b) 11 East, 301.

(c) 3 B. & C. 291.

series

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saries by divers persons, as well for carrying on such business as for her own support; that by such business she acquired great gains; and that the defendant spoke the words in question of and concerning her in her business (a); and the declaration alleges special damage resulting in various ways from the speaking of these words. Now, in the first place, although the wife was a boarding-house-keeper, and the words spoken might affect her in the way of her business, yet they are not in themselves applicable to her in respect of the business. The imputation they convey is of general misconduct. The only ground upon which it could be alleged that an action was maintainable in respect of them would be a special damage; but that accrues to the husband, not the wife; for although it is alleged that she lived apart from him, it is not stated that there was any separation by deed, or any fund provided for the separate maintenance of the wife. But, further, I think a married woman, even if divorced *a mensâ et thoro*, is not capable of receiving special damage by words spoken of her: such damage is the husband's. The present case is, in this respect, like *Coleman v. Harcourt* (b), only it is stated here that the wife was living separate and apart from her husband, but that averment makes no difference in point of law. If a trespasser had broken into her house, the damage would have been the husband's. That was held in *Boggett v. Frier* (c). Here, upon the statement in the pleadings, it must be considered that the wife is merely allowed, as matter of arrangement between her and her husband, to carry on a business as his agent, and receive

(a) In one set of counts the words were not so laid. See p. 516. *antè*.

(b) 1 *Lev.* 140.

(c) 11 *East*, 301.

the profits. If, therefore, there was a damage in respect of the business, it accrued to him alone. The wife was incapable of trading. As to a wife being the meritorious cause of action, there are many cases where she is the groundwork of the action, and yet not properly the meritorious cause. In an action for recompense due to her, for instance, as a nurse, she is so: but it is different in a case like that of the dippers at *Tunbridge Wells* (a), where the action was in respect of a vested interest in the wife. The damage, however, and right of action, stated in the present declaration, accrue to the husband alone: the judgment must therefore be arrested.

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against
SWENNY.

TAUNTON J. I am of the same opinion. The distinction in cases of this kind is, that if there be a personal wrong or violence done to the wife, so that an action would survive to her, she ought to be joined, and not the less because the husband puts into the declaration some special damage accruing to himself. So it was held in *Russel et Ux. v. Corne* (b): but where the injury is not of that kind, and no action would survive to the wife, the only cause being a special damage to the husband, the wife cannot be joined, having no legal interest in that which forms the gist of the action. For that reason the judgment was arrested in *Coleman v. Harcourt* (c). Now, here the declaration states, in substance, that the wife lived separate from her husband, and kept a boarding-house on her own account. But a married woman is incapable of carrying on business, or having property of her own, except through

(a) *Weller v. Baker*, 2 Wils. 414.

(b) 1 Salk. 119.

(c) 1 Lev. 140.

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trustees. The declaration then complains, that by reason of the words, the female plaintiff lost her credit and custom : but, if the business was the husband's, as in point of law it was, the loss occasioned by the words was a pecuniary loss to him, and not to the wife. She, therefore, had no substantive ground of complaint, and the declaration is bad, as stating a defective cause of action. It is unnecessary to say whether or not the husband could have sued under these circumstances : it is sufficient that the husband and wife cannot.

PATTESON J. The declaration contains no counts on words actionable in themselves ; they are only so in respect of special damage in the strict sense, or as being spoken in relation to a trade. If there had been evidence at the trial of the special damage complained of in the last set of counts, I think it is possible they might have been supported, because the damage complained of there is personal to the wife. But the other counts relate wholly to the trade, which is the trade of the husband, and in which he alone is injured. It is not necessary to determine whether or not he could have maintained the action under the circumstances stated, at all events the husband and wife could not.

DENMAN C. J. was not present during the whole of the argument, but he now intimated his opinion to be that the declaration was bad, as alleging a damage which was clearly the husband's, and in respect of which the wife ought not to have been joined.

Rule absolute for arresting the judgment.

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VAUX *against* VOLLANS, Clerk.Monday,
January 28th.

DEBT' for penalties on the 57th G. 3. c. 99., against the defendant, the rector of *Hemsworth*, in the West Riding of *Yorkshire*, for wilfully absenting himself from his benefice, without licence or exemption. Plea, nil debet. At the trial, before *Alderson J.* at the Spring assizes for the county of *York*, 1832, it was proved, by the agent of the plaintiff's attorney, that he, on the 3d of *April*, served a notice of the cause of action, signed by the attorney, on the deputy registrar of the archbishop of *York*, personally, at his residence at *Monkgate* in that city, the public registry being kept in a different place, namely, the office in the Minster-yard. The agent went first to the registry, but it was shut. The deputy registrar stated that he took the notice to the registry office on the following morning, and placed it on his desk there. The writ was sued out on the 5th of *May*. It was objected, that this service was insufficient; the statute 57 G. 3. c. 99. s. 40. (a) requiring the notice

One calendar month before the commencement of an action for penalties against a clergyman for non-residence, a notice in writing of the intended writ and cause of action was delivered to the bishop's deputy registrar at his own house, and carried by him the next morning to the registry office, and there left: Held, that that was not sufficient to satisfy the 57 G. 3. c. 99. s. 40., which requires such notice to be delivered to the bishop of the diocese, by leaving the same at the registry of his diocese.

17 v. 51, 128.

(a) After reciting, that notwithstanding the regulations contained in that act, spiritual persons may through inadvertence, and in many cases from unavoidable circumstances and causes, become subject to penalties and forfeitures, and vexatious prosecutions, unless provision is made for the prevention thereof; it enacts, "that no writ shall be sued out against, nor any copy of any process at the suit of any informer, be served upon, any spiritual person, for any penalty or forfeiture incurred under any of the provisions of this act, until a notice in writing of such intended writ or process shall have been delivered to him, or left at the usual or last place of his abode, and also to the bishop of the diocese, by leaving the same at the registry of his diocese, by the attorney or agent for the party who intends to sue or cause the same to be sued out or served, one calendar month

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notice of the cause of action to be delivered to the bishop of the diocese, by leaving the same at the registry of his diocese. The learned Judge thought that, as the registrar had carried the notice on the 4th of *April* to the registry office, and left it there, the statute was complied with; but he reserved liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that it was necessary that the notice should be left at the registry of the diocese.

It was further objected, that the notice served on the deputy registrar was not served by the person whose name was indorsed on the process, as required by the act of parliament. The learned Judge thought that the name of the plaintiff's attorney being indorsed on it was sufficient, but reserved liberty to the defendant to move to enter a nonsuit on that point.

The plaintiff then proved that the defendant was absent from his benefice during the years 1829 and 1830, but that during a great part of that period he was confined for debt within the rules of the King's Bench Prison. It was contended that the defendant could not be considered as having been wilfully absent during the period of his imprisonment. The learned Judge told the jury that the absence was wilful, unless the defendant proved some reasonable cause for it, and that confine-

month at least before the suing out or serving the same; in which notice shall be clearly and explicitly contained the cause of action which such party hath, and the penalties for which such person intends to sue; and on the back of which notices respectively shall be indorsed *the name of the attorney or agent*, together with the place of his abode.

Sect. 41. enacts, "that no plaintiff shall recover against any spiritual person for any penalty or forfeiture under the provisions of this act, unless it is proved upon the trial that such notices were respectively given as aforesaid."

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ment in prison for debts contracted by himself, was not a reasonable cause of absence.

The jury found that the defendant had been wilfully absent for a year, unless the period of his confinement in prison made a difference, and a verdict was entered for the plaintiff for 532*l.* 10*s.*, three fourths of the annual value; but liberty was reserved to reduce it to two thirds, if the absence during imprisonment was not to be deemed wilful.

A rule nisi was obtained for entering a nonsuit, or reducing the damages, but as the judgment of the Court proceeded on one point only, it has been deemed unnecessary to state the arguments on the others.

F. Pollock and *Tomlinson* now showed cause. The service of the notice on the deputy registrar was sufficient, because that notice was deposited in the registry office in due time. The deputy registrar may be considered as the agent of the plaintiff's attorney, for the purpose of taking the notice to the office.

Blackburne contra. The object of s. 40., as appears from the preamble, was to protect clergymen from vexatious proceedings, and the forms required by that clause ought to be strictly pursued. It points out, in express terms, the mode of serving the notice of action on the bishop; viz. by leaving the same at the registry of his diocese. The party employed is bound to do this, and not what he considers equivalent.

LITTLEDALE J. I am of opinion that a nonsuit ought to be entered in this case, because there has not been a proper service of the notice of action on the bishop of the

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1833. the diocese, as required by the 57 G. 3. c. 99. s. 40.

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The preamble of that clause is important, as shewing the intention of the legislature to protect spiritual persons from vexatious prosecutions. It is then, in the body of the clause, enacted, “that no writ shall be sued out against any spiritual person for any penalty incurred under that act, until a notice in writing, &c. shall have been delivered to him, or left at the usual or last place of his abode, and also to the bishop of the diocese, by leaving the same at the registry of his diocese.” The statute therefore distinguishes between service on the clergyman personally, and service at his dwelling-house, and makes either sufficient. But if it had said that delivery to him should be at his residence, delivery to him personally would not have sufficed; although the object of the legislature in requiring that it should be left in a place where it would come to the view of the clergyman would be as well attained by personal delivery. The statute does require that the delivery to the bishop shall be by leaving the notice at the registry of his diocese. The object that it shall be left in a place where it is likely to be attended to by the bishop or his officer, may have been attained by its having been first delivered to the deputy registrar, and afterwards carried by him to the registry office; but that is not the specific mode of delivery required by the statute. If we hold that a personal service on the deputy registrar was sufficient, it might then be said that a delivery to a clerk or porter, elsewhere than at the registry office, might suffice. I think the safest course is to adhere to the words of the legislature. The rule for entering a nonsuit must be made absolute.

TAUNTON

TAUNTON J. I am of the same opinion. We must give effect, if possible, to all the words used by the legislature. Here the words are “that the notice shall be delivered to the bishop of the diocese, by leaving the same at the registry of his diocese.” If there were not such words, a constructive delivery might do; but to give effect to those words, we must hold that the only service on the bishop must be by leaving the notice at the registry. If we were to construe the statute otherwise, other cases might occur still less conformable to the words of the act, and, at last, any service might be deemed sufficient. The safer course is to adhere to the very words of the act.

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PATTESON J. I think we must abide by the words of the statute, though I have come to that conclusion with some difficulty. The words of the act (for what purpose introduced I cannot say) are, “by leaving the same at the registry of his diocese.” Now suppose the attorney had gone to the bishop’s residence, and put the notice into his hand, it would be impossible to say that he had not had notice; yet, that would not be sufficient, because the notice was not delivered to him in the specific mode required by the act of parliament. It is indeed stated in evidence that the notice came to the deputy-registrar, and that he afterwards put it on his desk in the registry-office; but it does not appear that this was done with a view to a serving of notice pursuant to the act.

Rule absolute for entering a nonsuit.

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Tuesday,
January 29th.

The KING *against* The Directors of the EAST
INDIA Company.

The Court of Directors of the *East India* Company sent to the Board of Control for their approval a draft of a dispatch, headed "Political Department," which that Board altered, and returned to them to be transmitted to *India*, pursuant to 33 G. 2. c. 52. s. 12. The directors objected to the alterations, but not to the jurisdiction of the commissioners to make them; and, the alterations being insisted on by the Board, the directors afterwards rescinded the resolution on which the dispatch was founded, and left it to the commissioners

to originate the dispatch pursuant to the sect. 15. of the statute. On motion for a mandamus to the directors to transmit the altered dispatch:

Held, first, that the conduct of the directors was equivalent to a refusal to transmit the dispatch; secondly, that the directors could not in this case annul the resolution on which the dispatch had been founded; thirdly, that the dispatch having been originated by the directors, and altered by the Board of Control, and ordered by them to be transmitted, and the proceedings being so far regular, it was no answer to an application for a mandamus, that the Board might by another proceeding, as by originating a dispatch, attain the same end; fourthly, that the Directors, having admitted the jurisdiction of the Board with respect to the dispatch, and only contested the alterations, were estopped from afterwards contending that the dispatch was not one over which the Board had authority.

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court of the *Nizam*, recommending him to obtain the concurrence of the *Nizam's* government in enforcing such adjustment as might be come to in *Palmer & Co.'s* affairs. This dispatch headed "Political Department," was sent by the Directors on the same 20th of *March*, to the Board of Commissioners for the affairs of *India*, (called the Board of Control,) for their consideration and approval. On the 14th of *May*, the Board returned the dispatch to the Court of Directors with some alterations and additions, and with a letter, under the hand of their secretary, stating the reasons of such alterations, and expressing the wish of the Board that the dispatch, as then amended, might be transmitted to *India* in the usual form, according to the statute 33 G. 3. c. 52. s. 12. The Court of Directors objected to the alterations, and sent the dispatch back to the Board of Commissioners stating their objections. The Board adhered to the alterations they had made; and on the 8th of *August* the Court of Directors passed a resolution, that the claim of *Palmer & Co.* on the subjects of the *Nizam* did not relate to the civil or military government, or revenues, of the territorial acquisitions in *India*, and ought not to form the subject of a dispatch framed by the Court and approved or altered by the Board; and, being of opinion, on reflection, that it would be inexpedient for the company to attempt the exercise of any interference in that matter with the *Nizam*, the Court of Directors rescinded their resolution of the 20th of *March* on which the dispatch was framed. A further correspondence took place between the Court of Directors and the Board of Control, in the course of which the Directors stated that they left it to the Commissioners to originate the dispatch them-

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selves, as they were authorized to do under the 33 G. 3.
c. 52. s. 15.

Spankie Serjt., Sir James Scarlett, Wigram, and Follett, shewed cause on a former day in this term (a). First, a mandamus will not lie, because there has been no refusal by the directors to transmit the dispatch, but, merely to be the originators of it. Secondly, this dispatch was not one relating to the civil government or revenues of *India*, and therefore the Board of Control had no right, by 33 G. 3. c. 52. (b), to alter it. It related to a claim which

(a) *January 21st, before Littledale, Taunton, and Patteson Js.*

(b) By section 2. certain public officers (who are usually denominated the Board of Control) are appointed commissioners for the affairs of *India*. By section 9. these commissioners are invested with full power and authority to superintend, direct, and control all acts, operations, and concerns which in anywise relate to or concern the civil or military government or revenues of the territories and acquisitions of the *East India Company* in the *East Indies*. subject to the particular directions of the act.

Section 11. enacts, that the Court of Directors of the *East India Company* shall deliver to the Board of Control copies of all minutes, orders, resolutions, and proceedings of all courts of proprietors and courts of directors, and also copies of such documents received from abroad as are enumerated in the clause.

Section 12. directs that no orders or instructions relating to the civil or military government or revenues of the territorial acquisitions in *India*, shall be sent or given to any of the governments or settlements in *India* by the Court of Directors until the same shall have been submitted to the consideration of and approved by the Board of Control, and for that purpose copies of all orders and instructions which the Court of Directors shall propose to be sent to *India*, shall be by them previously laid before the Board of Control; and that within fourteen days after the receipt of such proposed dispatches, the said Board shall either return the same to the directors with their approbation, or if the Board shall disapprove, alter, or vary in substance any of the proposed orders or instructions, they shall give to the directors their reasons at large in respect thereof, together with their instructions to the directors in relation thereto. And the directors shall, and they are thereby required forthwith to dispatch and send the letters, orders, and instructions in the form approved by the Board to the

which certain individuals had on the subjects of the *Nizam*, and which, in an ordinary case, would be the subject of a law-suit; and it recommends the resident

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the proper governments or officers in *India*, without further delay, unless, upon any representation of the directors, the Board shall order any alterations to be made therein. And the directors shall and they are thereby required to pay obedience to, and shall be governed and bound by, such orders and instructions as they shall receive from the Board of Commissioners touching or concerning the civil and military government of the said territories and acquisitions, and the revenues of the same.

Section 13. authorizes the Directors to make representations to the Board of Commissioners as to any disapproval or alterations which the Board have made. And the Board are required to take these representations into consideration, and to give such further orders and instructions as they shall think fit and expedient, which orders shall be final and conclusive upon the directors.

By section 15., whenever the Directors shall neglect to frame and transmit to the Board dispatches on any subject connected with the civil or military government or revenues of *India*, beyond fourteen days after requisition made to them by order of the Board, the Board may prepare and send to the directors, (without waiting for the receipt of the copies of dispatches intended to be sent by the directors), any orders or instructions for any of the governments or presidencies in *India* concerning the civil or military government of the said territories or revenues thereof; and the directors are required to transmit dispatches according to the tenor of the said orders and instructions unto the respective governments and presidencies in *India*, unless upon any representation made by the directors to the Board, the Board shall direct any alteration; which directions the said Court of Directors shall in such case be bound to conform to.

Section 16. provides, "that nothing in the act shall extend or be construed to extend, to give to the Board any power to issue or send any orders or instructions which do not relate to points connected with the civil or military government or revenues of the *British* territories in *India*, nor to expunge, vary, or alter any dispatches proposed by the directors, which do not relate to the said government or revenues. And if the board shall send any orders or instructions to the Court of Directors to be by them transmitted, which, in the opinion of the said Court shall relate to points not connected with the civil or military government or revenues, the said Court may petition his Majesty in council, and his Majesty in council shall decide whether the same be or be not connected with the civil or military government, &c., which decision shall be final and conclusive.

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to interpose and use his influence with the *Nizam* for the benefit of those individuals, not for that of the company. Assuming that it was a matter relating to the civil government or revenues, the Court of Directors have rescinded the resolution on which the dispatch was founded; and that distinguishes the present case from *Rex v. The Directors of the East India Company* (a). It is reasonable that the directors should have the power of rescinding such a resolution. Circumstances may occur between the framing of the dispatch, and its return by the Board, of which the directors were not aware at the time of originating it, and which might well justify them in annulling it. There is no clause in the act which prevents them from rescinding a resolution originating with themselves; though there is one in section 29., which prevents a Court of Proprietors from rescinding any order or resolution of the Court of Directors. Where the Board of Control originates an order, which, in the opinion of the Court of Directors, relates to points not connected with the civil or military government or revenues, they (the directors) may appeal to the king in council, who is finally to decide that question. But where such order originates with themselves, and is altered by the Board of Control, the Court of Directors have no power to appeal. Suppose, then, the directors framed a dispatch relating entirely to trade, and the Board of Control so altered it as to make it relate to the civil or military government or revenues; it cannot have been the intention of the legislature to compel the directors to send such a dispatch to India, as if it originated with themselves; and as they have no

(a) 4 M. & S. 279.

power to appeal against such an altered dispatch, it seems to follow *ex necessitate* that they should be entitled to rescind any order from which such altered dispatch originated. Besides, here a *mandamus* will not lie, because the Board of Control have another remedy; for, according to section 15., they may originate a dispatch themselves.

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The *Attorney General* and *Solicitor General*, and *Amos*, *contra*. The rescinding of the resolution on which the dispatch was framed is equivalent to an absolute refusal to transmit it. This was a dispatch relating to the civil government. The subject matter of it was certain claims which individuals, subjects of the *East India Company*, had upon subjects of the *Nizam*. Those claims, as between the individuals interested, would, in an ordinary case, form the subject of a suit in the municipal courts; but as soon as the Company made use of the power and character belonging to it as a government, to influence the *Nizam* to use his sovereign authority with his own subjects to enforce the settlement of those claims, the subject matter of the negotiation respected the civil government. The dispatch is headed "Political Department," and the directors, in their correspondence, have always treated it as one relating to the civil government, and are now estopped from saying it does not. Then as to the directors having rescinded the resolution on which the dispatch was framed, they can have no power so to do, unless the act of parliament gives it them; but it gives them none: on the contrary, s. 12. requires them to transmit orders originating with themselves, and altered by the Board of Control, forthwith to *India*, to pay obedience to and to be governed

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and bound by such orders. There is one exception, viz. where, on any representation made by the directors, the Board shall order any alterations to be made therein. Here such representations were made by the directors; but the Board did not direct any alteration. The directors, therefore, were bound to transmit the dispatch, and had no power to rescind the resolution on which it was framed. Section 16. gives the power of appeal against orders either originating with the Board of Control, or originating with the directors and varied or altered by the Board. [*Patteson J.* It enacts, that if the said Board shall send any orders to the directors, to be by them transmitted, which, in the opinion of the directors, shall relate to points not connected with the civil or military government, or revenues, the directors may appeal. Now suppose the Court of Directors frame a dispatch, containing matter not connected with the civil government or revenues, and the Board of Control alter it, by inserting matter which clearly is connected with those subjects; what is to be done?] That would be tantamount to originating a dispatch by the Board of Control. But here the Board of Control have sent orders to the Court of Directors to transmit a dispatch originally relating to the civil government, which order they, according to s. 12. ought to have obeyed. If the order of the Board was objectionable, within sect. 16., the directors might have appealed. In *Rex v. The East India Company (a)*, this Court and the Privy Council must have been of opinion that the Court of Directors might appeal to the Privy Council upon the question whether a dispatch, originating with them,

(a) 4 M. & S. 279.

and altered by the Board of Control, related to the civil or military government or revenues of *India*; for there time was given to the directors to appeal to the Privy Council, and the Privy Council entertained that appeal. It is not true that there is another remedy here; for the act of parliament, by s. 15., gives to the Board of Control the power of originating a dispatch, not in a case like the present, but only where the *East India Company* neglect to frame and transmit a dispatch on any subject connected with the government or revenue beyond the space of fourteen days after requisition made. Here the directors have not neglected to frame and transmit a dispatch to the Board; they have already done so.

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Cur. adv. vult.

LITLEDALE J. now delivered the judgment of the Court. After stating the facts, and that the question arose upon the construction of the 33 G. 3. c. 52., and particularly of ss. 9. 11, 12, 13. 15. and 16., the learned Judge proceeded as follows:—The first objection to this mandamus made by the Court of Directors, is, that there does not appear to have been any refusal on their part to transmit the dispatch which is the subject of the rule. But we are of opinion that, from the discussion and correspondence that have taken place, though there may not have been a distinct refusal in so many words, there has been, particularly from the rescinding of the original resolution, such a refusal as is sufficient to authorize the Court to entertain the subject matter of the mandamus.

. The Court of Directors then object, that they have rescinded the resolution of 20th *March*, under which this
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dispatch was framed; and certainly, if they could rescind that resolution, there would be an end of the dispatch altogether, and all the alterations made by the Board of Commissioners would fall to the ground with the dispatch, and no mandamus could issue.

But we are of opinion that the Court of Directors had no authority to rescind their resolution of the 20th of *March*. The act of parliament gives no such power; and we think that there is no implied power.

The dispatch then framed has been sent to the Board of Commissioners; and that board has acted upon it, has made alterations, and returned it to the Court of Directors: upon that a discussion has taken place between these two bodies: and as the act of parliament has been thus proceeded upon by the two bodies constituted for the purpose of considering any measure under the provisions of the act, we think it is not competent for the Court of Directors to annul the dispatch which they have originated, and more particularly, as the latter part of the 13th section says that the orders and instructions of the Board of Commissioners in such a case are to be final and conclusive on the directors. If that could be done, the Court of Directors might at any time annul a dispatch when they were not satisfied with the alterations of the Board of Control, and thus produce the greatest inconvenience in the administration of the affairs which are now entrusted to two separate jurisdictions, each of which is to perform its own functions.

It is urged by the directors, that a mandamus ought not to be granted if there be another remedy; and that there is another remedy in this case, inasmuch as the Board of Control may, under the fifteenth section of
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the act, themselves originate a dispatch to answer all the purposes of the altered dispatch, if the directors do not frame and transmit one within fourteen days after request, and that, therefore, this mandamus is not necessary.

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But we are opinion that such an objection to a mandamus cannot be supported. Here a measure has been begun and carried up to a certain point, which is capable of being enforced if the parties who apply for a mandamus are correct in their proceedings: and it is no answer to say that, by some other proceeding to be instituted by them, they may attain the same object. The Board of Commissioners have a right to deal with the existing state of things; and are not bound to abandon that and resort to some other proceeding, merely because it may possibly in the end have the same effect.

Having disposed of these questions, the case comes to this: the directors originate a dispatch which they now say does not relate to the government of *India*; but they head it "Political Department." This dispatch is transmitted to the Board of Control, who, it is said, alter it in such a way as to make it a dispatch relating to the government. The directors enter into discussions with the Board of Control, and in these discussions they do not object to the jurisdiction of the commissioners, but their objections are to the merits of the alterations. And we think that, with relation to the present proceedings, they are bound by that admission, and cannot now retract it.

We give no opinion whether the dispatch, if it had not been headed, and afterwards treated as we have mentioned, really did relate to the government of *India*, nor whether this Court has jurisdiction to decide upon
that

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that question if it should come before us in any other way, nor whether the directors can in any other mode avail themselves of the opportunity of shewing that it did not relate to the government.

Neither do we give any opinion whether the sixteenth section gives an appeal in case of an altered dispatch, as well as a dispatch originating with the Board of Commissioners. Upon that right no such discussion has been raised as to affect the question, whether a mandamus should go. Neither has any application been made to enlarge the rule, to give an opportunity of appealing, as was done in the case of *The King v. The Court of Directors of the East India Company* (a).

Upon the whole of this case, we are of opinion that the rule for the mandamus should be made absolute.

Rule absolute (b).

(a) 4 M. & S. 279.

(b) By the statute 3 & 4 W. 4. c. 85. s. 30. the Court of Directors are prohibited from sending any dispatches, &c. "relating to the said territories, (mentioned in sect. 1.) or the government thereof, or to the property or rights vested in the said company in trust as aforesaid, (s. 1.) or to any public matters whatever," till the same shall have been submitted to, and approved by, the Board of Control; except where the Board shall otherwise allow, as they are empowered to do by the same section. Sections 31. and 32. contain other provisions on this subject; and section 33. provides, that if it appear to the directors that any dispatches, &c. upon which directions may be given by the Board, are contrary to law, the directors and the Board may send a special case to three or more Judges of K. B. for their opinion, which opinion the said Judges are required to certify, and the same shall be final.

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SNOWBALL, qui tam, &c. against Sir HARRY
JAMES GOODRICKE.

Wednesday,
January 30th.

DEBT, against the late sheriff of *Yorkshire*, under 29 *Eliz. c. 4.*, for taking more than the legal poundage on levying two executions. Plea, the general issue. The cause was tried before *Alderson J.*, at the *York Spring assizes 1832*. For the purpose of proving that the bailiff who made the levy acted under the authority of the sheriff, the plaintiff's counsel put in copies of the writs returned in the two actions, having the bailiff's name indorsed; and in order to shew that such indorsement was made in the sheriff's office by proper authority, a witness was called to prove certain declarations made to him on the subject by Mr. *Russell*, who was the defendant's under-sheriff: but it appeared that this conversation took place after Mr. *Russell* had gone out of office, and therefore *Alderson J.* rejected the evidence, and the plaintiff was nonsuited. *J. Williams*, in the next term, obtained a rule nisi for a new trial, against which

In an action against the sheriff, admissions by the under-sheriff are not evidence, unless they accompany some official act of the latter, or tend to charge himself.

And, therefore, in an action against the sheriff for taking illegal poundage, declarations of the under-sheriff, after he was out of office, are not admissible to prove that the bailiff charged with having committed the extortion was the sheriff's authorized agent.

3 Bac. 147.

Cresswell, in this term, shewed cause. The evidence was rightly rejected. The regular proof of the bailiff's authority is the warrant; or, if that cannot be produced, and its absence is duly accounted for, evidence of its contents. In default of such proof, the writ, indorsed with the bailiff's name, is sufficient, if it be shewn that the practice of the sheriff's office was to indorse the name of the bailiff on the writ which he was to execute,

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execute, for otherwise it does not appear that the indorsement was made by any proper authority. To establish that point in the present case, evidence was offered of Mr. *Russell's* declarations: and if he had been under-sheriff at the time, they might have been receivable, on the ground that any thing said upon such a subject by the under-sheriff, as such, is part of the transaction, and binds the principal. But this is only the case so long as the declarations are made by him in the course of his official duty: nor, unless that be so, can they affect the sheriff as admissions.

John Williams contra. It is not contended that the mere fact of the bailiff's name appearing on the examined copy of the writ is sufficient to shew that the name was put on according to the course of business in the office; but the other evidence sufficiently proved that. There is no technical rule of proof in such a case. The fact itself, of the indorsement of the name by authority, is only part of a chain of secondary evidence. The indorsing of the name in the office, probably by some inferior officer, is not more conclusive than the declaration of this party. In *Drake v. Sykes (a)*, it was held that the sheriff was not affected by the act of his bailiff without particular evidence of privity between them; but there Lord *Kenyon* and *Lawrence J.* drew a strong distinction, in this respect, between a bailiff and the under-sheriff. [*Denman C. J.* Is there any difference between one agent and another, if the observation relied upon is merely a gratuitous one, and not made in the course of his duty?] It is on a point intimately connected with

(a) 7 T. R. 113.

the duty of the office. The circumstances under which the declaration was made, and the occasion of making it, would only operate so far as to give it more or less effect with the jury. [*Patteson* J. referred to *North v. Miles* (a). *Denman* C. J. In *Yabsley v. Doble* (b), it was held that an under-sheriff's confession of an escape was evidence to charge the high-sheriff, because the under-sheriff gives a bond to save him harmless; and therefore his confession, in effect, charges himself.] That goes far in identifying the sheriff generally with the under-sheriff as to admissions and declarations. [*Denman* C. J. But a special ground is assigned. The language of Lord *Kenyon* and *Lawrence* J. in *Drake v. Sykes* (c), does certainly appear to identify the under-sheriff with the sheriff to all intents. The question is important, and we will consider of it.]

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Cur. adv. vult.

DENMAN C. J. now delivered the judgment of the Court. We are of opinion, that an under-sheriff is not competent to charge the sheriff by his declarations, unless they accompany some official act, or unless they tend to charge himself, he being, in truth, the real party in the cause. The rule must therefore be discharged.

Rule discharged.

(a) 1 *Camp.* 389.(b) 1 *Ld. Ray.* 190.(c) 7 *T. R.* 113.

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Wednesday,
January 30th.

DOYLE *against* DOUGLAS.

18 - 126
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Where actions against underwriters have been consolidated by rule of Court, and the defendant has obtained a verdict in one, the Court will not restrain the plaintiff from trying a second cause, included in the same rule, till the costs of the first are paid.

THE plaintiff had commenced eleven actions against the underwriters of a policy on the ship *Triton*, claiming as for a total loss. A consolidation rule was afterwards entered into, whereby ten of the defendants agreed to be bound by the verdict in the first action, viz. *Doyle v. Dallas*, to make certain admissions, and to bring no writ of error, and file no bill in equity for delay; and the proceedings in the last ten actions were to be stayed till after the trial of the first. On the trial of *Doyle v. Dallas (a)*, in *February* 1831, a verdict was found for the defendant; and judgment was afterwards signed and execution issued for the costs in that action. No levy could be made, the plaintiff's goods being conveyed out of reach; and he stated to the defendant's attorney, that his payment of the costs depended on the sale of certain property in which he was interested, and which sale could not then be forced on. The present cause in the meanwhile standing for trial, an order was made by a Judge at chambers, that the trial should be postponed till after the sittings in *Hilary* term 1833, the defendant in *Doyle v. Dallas* undertaking not to issue fresh execution for his costs (the former writ having expired) without leave of the Court. The cause having been set down for trial at the next special jury sittings in *Middlesex* after the present term, *F. Pollock*, in the course of the term, obtained a rule to shew cause why

(a) 1 M. & Rob. 48.

IN THE THIRD YEAR OF WILLIAM IV.

the proceedings in *Doyle v. Douglas* should not be stayed till the plaintiff should have paid the costs in *Doyle v. Dallas*, and why the defendant in the latter cause should not be at liberty to issue execution.]

Sir *James Scarlett* now shewed cause, on affidavits stating, among other things, that the plaintiff had now obtained fresh evidence (which was specified) on a part of the case as to which the jury had been misled on the former trial; and he contended, that in practice the plaintiff was not debarred by a consolidation rule from proceeding in a second action, included in the rule; nor was it reasonable that he should be so, the rule being for the benefit of the defendant; and, therefore, that the terms here contended for ought not to be imposed.

F. Pollock and *Maule* contrà. The costs of the former trial ought to be paid before the new one is proceeded upon, as in ejectment. Formerly it was thought that a consolidation rule bound the plaintiff as well as the defendants; but since a different doctrine has been established (a), the practice should be analogous to that in ejectment as to costs, the plaintiff

(a) In *Long v. Douglas*, *Michaemas* term 1831, it appeared that ten actions against underwriters had been consolidated, on the condition, among others, that the defendants should make certain admissions. The plaintiff, failing in the first cause, gave notice of trial in another. The costs of the first were still unpaid. A rule nisi was obtained for staying all proceedings in this second action. Cause was shewn, (Nov. 25th), and *Burstall v. Horner*, 7 T. R. 372. and *Cohen v. Bulkeley*, 5 Taunt. 165. were cited. The Court discharged the rule; Lord Tenterden, however, observing, that where the plaintiff proceeds in a second consolidated action without applying to the Court, he cannot have the benefit of any terms which were imposed on the defendants by the consolidation rule. 52

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DOYLE
against
DOUGLAS.

1833 - 036

having in other respects the benefit of that form of action. Here every defendant is bound by the verdict in one case, if the plaintiff succeeds. The rule in ejectment has been extended to other cases where the title relied upon by the plaintiff in the second action was clearly the same as in the first. The plaintiff himself states here, that he relies upon new evidence on a question already tried.

Per Curiam (a). To grant this rule would be stretching the authority of the court farther than we are entitled to carry it. By the practice contended for, the plaintiff, as well as the defendant, would be bound by a consolidation rule. In ejectment, the Court would not stay proceedings in a second cause, where the defendant was a different party. The defendant may issue execution; but the rest of the rule must be discharged.

Rule absolute for issuing execution only.

(a) *Denman C. J., Littledale, Taunton, and Patteson Js.*

Wednesday,
January 30th.

DEAN and Another *against* JAMES.

11 - 30
E 23d
y. 423

Proof of a tender of 20l. 9s. 6d. in bank notes and silver, is sufficient to support a plea of tender of 20l.

7 Dec. 5-24

ASSUMPSIT for goods sold and delivered. Plea, non-assumpsit except as to 20l. parcel, &c., and as to that sum a tender. Replication, that the defendant did not tender and offer to pay to the plaintiffs 20l. parcel, &c., in manner and form as the defendant had in his plea alleged. At the trial before *Denman C. J.*, at the *Middlesex* sittings after last *Michaelmas* term, the defendant proved a tender to plaintiff of 20l. 9s. 6d. in bank notes and silver, and obtained a verdict, the Lord Chief

Chief Justice being of opinion that this proof was sufficient. In the early part of this term *Law* obtained a rule nisi for a new trial, and cited from *Harrison's Digest*, vol. 2. p. 516., *Watkins v. Robb* (a), as shewing that proof of a tender of 4*l.* 19*s.* 6*d.* is not evidence to support a plea of a tender of 4*l.* 9*s.* 6*d.* *Wightman* and *Thesiger* were now about to shew cause, but the Court called upon

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against
JAMES.

Law and *Manning* to support the rule. The tender which is proved must be of the specific sum pleaded. Where there is a plea of tender, and a replication of a subsequent demand and refusal, the plaintiff must prove that, after the tender admitted in the pleadings, he demanded of the defendant the precise sum before tendered and refused, *Spybey v. Hide* (b), *Rivers v. Griffiths* (c). Then, if the plaintiffs here had replied a subsequent demand and refusal of 20*l.*, proof of a demand of 20*l.* 9*s.* 6*d.* would have been inapplicable; and yet, if the Court should hold the plea of tender of 20*l.* to be proved by a tender of 20*l.* 9*s.* 6*d.*, the plaintiffs would have demanded the very sum actually tendered. [*Denman* C. J. referred to the third resolution in *Wade's* case (d).] That was not necessary to the decision, for there the actual amount due was tendered. So it was in *Douglas v. Patrick* (e), and *Cadman v. Lubbock* (g), though in the first case two accounts were mixed together, and in the second, change was wanted. There is no case in which the actual offer was of a sum exceeding that which was

(a) *S. C.* 2 *Esp. N. P. C.* 710.(b) 1 *Camp.* 181.(c) 5 *B. & A.* 630.(d) 5 *Rep.* 115.(e) 3 *T. R.* 683.(g) 5 *D. & R.* 289.

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against
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due, except the present and *Watkins v. Robb* (a). There *Buller J.* was of opinion, that proof of a tender of 4*l.* 19*s.* 6*d.* did not support the plea of a tender of 4*l.* 9*s.* 6*d.* [*Taunton J.* There the defendant tendered a 5*l.* note and demanded 6*d.* change, which the plaintiff was not bound to give (b). The rule was granted entirely on a misapprehension of that case.

DENMAN C. J. I think the rule ought to be discharged.

LITTLEDALE J. This case falls within the third resolution in *Wade's case* (c), that if a man tender more than he ought to pay, it is good, for omne majus continet in se minus, and the other ought to accept so much of it as is due to him. As to replying a demand, it is not the plaintiff's business to demand more than is actually due; it is enough if in his replication he admits that the sum due was tendered, but alleges that he afterwards demanded that, and it was refused.

TAUNTON J. concurred.

PATTESON J. I am of the same opinion. The difficulty suggested as to replying would be cured by a special replication.

(a) 2 *Exp. N. P. C.* 710.

(b) *Betterbee v. Davis*, 3 *Camp.* 71.

(c) 5 *Co.* 115.

1833.

The KING *against* The Justices of SOMERSET-
SHIRE.*Wednesday,
January 30th.*

THE friendly society of *Marksbury* and *Stanton Prior* was instituted in the year 1784, and the rules of the society were enrolled at the quarter sessions for the county of *Somerset* on the 30th of *April* 1794, pursuant to the statute 33 G. 3. c. 54., and were amended, and duly certified on the 31st *September* 1832, pursuant to the statute 10 G. 4. c. 56. s. 4., by the barrister appointed to certify the rules of savings banks; and a transcript and duplicate were respectively signed by three of a committee, and by the clerk to the society, and were left with the clerk of the peace for the county of *Somerset*, before the day appointed for holding the quarter sessions, in *January* 1832, in order that the transcript might be laid before the justices of the county, to be confirmed and enrolled at such quarter sessions. The court of quarter sessions refused to allow and confirm the rules, because it did not appear to them that the table of payments to be made to the members, and of the benefits to be received by them, could be adopted with safety to all persons concerned, according to 10 G. 4. c. 56. s. 6. It was contended, that this clause did not extend to societies established before the passing of the act; but the court of quarter sessions thought it was a provision to which old societies were required to conform, by the thirty-ninth and fortieth sections of that Act. A rule nisi having been obtained for a mandamus to the justices of *Somersetshire* to enrol the rules,

The sixth section of the Friendly Society Act, 10 G. 4. c. 56. does not apply to a society formed before the passing of the act, though it has conformed to the provisions of the act, as required by sections 39. and 40.; and, therefore, the justices at quarter sessions are bound to enrol the rules of such a society, although it has not been made appear that the tables of payments to be made, and benefits to be received, may be adopted with safety to all parties concerned.

70. St. 216c.

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Erle now shewed cause. The question is, whether the 10 G. 4. c. 56. s. 6., extends to societies established and duly enrolled before the passing of that act. Section 1. recites, that it is expedient to amend the laws relating to friendly societies, and then repeals several statutes which related to those societies. Section 2. recites that certain friendly societies have been established, and that it is expedient to give protection to *such* societies, and the funds thereby established, and to afford encouragement to other persons to form the like institutions; and it then enacts, that any number of persons may form themselves into a society for mutual relief, &c. and raise a fund, and make rules." The enacting part of this section, and the provisions of sections 3. 4. and 5., clearly relate to societies to be formed after the act. Then section 6. provides, "that no rules of any society, hereafter to be formed, shall be allowed, unless it shall appear to the justices to whom the same are tendered, that the table of the payments to be made by the members, and of the benefits to be received by them, may be adopted with safety to all parties concerned." This section taken by itself would apply only to societies to be formed after the passing of the act; but it must be construed in conjunction with section 39., which enacts that the statute shall extend "to societies already established, as soon as they shall think fit to conform to the provisions thereof." The society in question has conformed to the provisions of the act; and it is, therefore, within the sixth section. Section 40. enacts, "that provided societies already enrolled shall not conform to the provisions of that act within three years, they shall cease to be entitled to the provisions or privileges of any or either of the therein-before repealed acts."

acts." Section 6., therefore, applies to such societies as choose to come in under section 39. and conform to the provisions of the statute, as well as sections 3. 4. and 5. But, secondly, it is not imperative on the justices, but discretionary in them, to enrol the rules. If that were not so, it would be nugatory to oblige the clerk of the peace to lay the rules before the justices.

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against
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Tidd Pratt contra. The 33 G. 3. c. 54. was the first statute passed on the subject of friendly societies. The rules of the society in question were duly enrolled under the provisions of that statute in 1794, and the society is now anxious to avail itself of the provisions of the late act, 10 G. 4. c. 56., which was passed to consolidate and amend the previous acts relating to friendly societies, but not to infringe upon, or take away, any privileges enjoyed by such societies under the 33 G. 3. c. 54. The 59 G. 3. c. 128. first made it necessary for a friendly society to submit its scale of payments and benefits to any person; and section 2., which applies to societies formed and enrolled after the passing thereof, provides, that the justices shall not confirm and allow any tables of payments or benefits, &c. until it shall have been made appear to such justices, that the said tables and rules are such as have been approved by two persons at the least, known to be professional actuaries, *or persons skilled in calculation*. The latter expression was found to be too vague, and new provisions are introduced in this act, sects. 6. and 34.; but both refer to societies formed under this act. In construing an act of parliament, effect ought to be given to every word of it; but, if the construction contended for by the justices is allowed to prevail, the words "hereafter to be formed"

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will be nugatory. It cannot be said that the society has “thought fit to conform” to the provisions of this act, and thereby voluntarily adopted the regulation in sect. 6., when the conformity is forced upon them by the thirty-ninth section.

DENMAN C. J. The question is, whether the provision contained in 10 G. 4. c. 96. s. 6. be one to which a society formed *before* the passing of that act must conform. It is confined in terms to a society *thereafter* to be formed. We are all of opinion, therefore, that the magistrates had no power in this case to refuse to enrol the rules on the ground assigned.

LITTLEDALE, TAUNTON, and PATTESON Js. concurred.

Rule absolute.

Thursday,
January 31st.

The KING *against* BATEMAN and Another,
Justices of FOLKSTONE.

To ground a proceeding at petty sessions under 7 & 8 G. 4. c. 31. s. 8., for compensation in respect of felonious injury by rioters, the party or his servant must go before a justice within seven days after

PLATT, in this term, obtained a rule nisi for a mandamus to *John Bateman* and *Richard Hart*, Esqrs., justices of *Folkstone*, to appoint a special petty session, pursuant to 7 & 8 G. 4. c. 31., for the purpose of hearing and determining the claim of *Clark Powsey* to compensation for damage which he had suffered by his house being in part feloniously demolished by rioters.

The affidavit of *Powsey* in support of the rule, stated the offence committed, and submit to examination, &c. according to sect. 5. of the act, as well as where an action is to be brought. And the Court will not grant a mandamus to summon such petty session, where it does not appear by affidavit that these steps have been taken, though the party swear that he has duly served the notice required by sect. 8.

the

the injury done, which was to an amount below 30*l.*, and then proceeded to allege that, five days afterwards, he served notice in writing upon a constable of *Folkstone*, that he intended to claim compensation, and thereby required the constable, within seven days of his receiving the notice, to exhibit the same to two justices of *Folkstone*, that they might appoint a time and place for holding a special petty session to determine the said claim. The notice appeared to be conformable to sect. 8. of the statute, and was served upon Messrs. *Bateman* and *Hart*; but they did not appoint any special session.

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The KING
against
BATEMAN.

Sir *James Scarlett* now shewed cause. The affidavit is defective, in not stating that the party damnified, or his servant who had the care of the property, went before a justice of the peace within seven days after the commission of the offence, as required by sect. 3. of the act, and there made the statement, submitted to the examination, and entered into the recognizance which that section prescribes. This is directed in the case of a summary proceeding within sect. 8., as well as where an action is to be brought.

Platt contrà. The eighth section does not require these preliminaries, but only the delivery of a notice in the manner there stated. Even if more be requisite, that will be a ground of objection at the petty sessions; enough is shewn here for the purpose of the present rule. [*Denman* C. J. Ought we to grant the mandamus if we see that the party will ultimately fail?] The only object at present is to put the magistrates in motion: the petty sessions are to hear and determine
the

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the claim. It may be shewn there that the proceedings mentioned in sect. 3. were actually gone through. [*Denman* C. J. The question is, whether, as a ground for this application, the party ought not to have sworn, at least in general terms, that he could prove those facts at the petty sessions.] If the regular proceedings have not been taken, the justices can return that to the mandamus. [*Patteson* J. We ought not to put them to that. *Littledale* J. Why are we to desire them to hold a petty session, when we do not see that the proper steps have been taken? It lies in the knowledge of the party applying, whether they have been so or not.]

Per Curiam. The best course will be, to enlarge the rule till next term, in order that the party may, if he is able, make affidavit that the requisites prescribed by the statute have been complied with. He may state this in general terms. If no such affidavit is made, there will be no mandamus.

In the following term, no affidavit having been made as required, the rule was discharged with costs.

1833.

HOWARD, Gent., One, &c. *against*
BARTOLOZZI (a).

ASSUMPSIT for money lent, &c. Plea, first, the general issue; secondly, a discharge under the Insolvent Debtor's Act, on the 28th of *July* 1830. At the trial before *Littledale J.*, at the *Middlesex* sittings in *Michaelmas* term 1832, it appeared that, before the defendant applied to that court to be discharged, she was indebted to the plaintiff in a sum of 127*l.*, the whole of which debt accrued before the 16th of *June* 1830, when her petition was filed; and that she had employed the plaintiff as her attorney, had consulted him on that occasion, and the schedule of her debts was made out in his office from accounts furnished by her to him, although he, not being an attorney in the Insolvent Court, did not act as her attorney there. The debt due to him from the defendant was not inserted in the schedule. Since her discharge, on being applied to for payment of the plaintiff's demand, she had admitted it to be due, and promised to pay it in three months. The defendant's counsel contended that it was the duty of the plaintiff to cause his debt to be inserted in the schedule; and that his omission so to do was a fraud, not only upon the policy of the Insolvent Act, but upon the defendant also, and therefore a defence to the present action. The learned Judge was of opinion that the

An attorney, *as B. & C. did* employed by a party about to take the benefit of the insolvent act, to prepare a list of debts, which were afterwards to be inserted in the schedule, omitted a debt due from the insolvent to himself, and sued for that debt after the party's discharge: Held, by *Dennman J.* and *Parke J.* that this was not such a fraud upon the general policy of the Insolvent Act, as would bar the action.

Quære, Whether, if he omitted to insert the debt in breach of his duty to his client, that would be a defence to an action brought by him against the latter to recover the debt, or whether it would only be the subject of a cross action?

If a defence,

quære whether or not it should be specially pleaded?

omission. *3 W. J. 143 m.*

Jabman & Jackson

Supra. 887.

264 W. 451.

256 W. 122 - 128 m.

(a) This case was argued and determined in *Michaelmas* term 1832.

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HOWARD
against
BARTOLOZZI.

omission by *Howard* to insert his debt was not any fraud upon the Insolvent Act, or the general body of creditors; and assuming it to be a fraud on the defendant, it would give her a good ground of action against *Howard*, but was no answer to this action. At the same time, he directed the jury to find specially whether or not the plaintiff was guilty of fraudulent conduct in wilfully concealing his debt and leaving it out of the schedule. The jury said, that they considered the debt as wilfully left out of the schedule. The learned Judge then directed a verdict to be entered for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A rule nisi was obtained for that purpose, against which

Campbell and *Follett* now shewed cause. The debt to the plaintiff never having been inserted in the defendant's schedule, her discharge under the Insolvent Act is no answer to this action. Assuming that the plaintiff wrongfully omitted to insert the debt, and that the defendant was thereby damnified, that may possibly afford her a good ground of action against the plaintiff, but it is no answer to an action brought to recover a debt which once existed, and has never been released or discharged. Secondly, assuming that that might be a defence to the action if properly pleaded, it is not a defence under the general issue. Thirdly, there was no evidence to warrant the special finding of the jury, that the debt was wilfully left out of the schedule by the plaintiff.

Kelly contra. It may be conceded that the discharge of the defendant by the court for the relief of insolvent
debtors

debtors is no answer to this action, the plaintiff's debt not having been inserted in the schedule. But the plaintiff's omission to insert the debt in the list from which the schedule was prepared, in order that he might sue for it at a future period, is a fraud against the policy of the law. The object of the legislature was, that the creditors of the insolvent should have a rateable proportion of their respective debts paid out of the property: but here, the plaintiff, by the device to which he has had recourse, would recover the whole of his debt, contrary to the intention of the law, *Jackson v. Davison* (a), *Carpenter v. White* (b). But further, after the finding of the jury, this must be taken to be, not only a fraud against the policy of the law, but on the defendant, and if so, is not merely a ground for a cross action, but, to avoid circuitry, must be an answer to the present action. In *Alderson v. Langdale* (c), where the vendee of goods paid for them by a bill of exchange, and the vendor, after acceptance, altered it in a material part, and thereby vitiated it, Lord *Tenterden*, at *Nisi Prius*, thought that the plaintiff might resort to the original consideration, and recover the price of the goods, although the defendant might have a cross action against the plaintiff for the damage sustained by the alteration of the bill; but, a verdict having been found for the plaintiff, the Court, after argument, and time taken to consider, were of opinion, that the vendor, having altered the bill, and thereby made it his own, could not recover for the goods sold; and that partly on the ground, that allowing the plaintiff to recover for his goods, and the defendant to bring a cross action,

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 against
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(a) 4 B. & A. 691.

(b) 3 B. Moore, 231.

(c) 3 B. & Ad. 660.

would

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would lead to a multiplicity of suits. (He further contended that the evidence was admissible under the general issue, and supported the verdict.)

DENMAN C.J. This is an application to enter a verdict for the defendant, on the ground, first, that the omission of the plaintiff to have his debt inserted in the schedule was a fraud against the policy of the law, and on the general body of creditors. I think there is no ground for so holding; because, here, the plaintiff never came in under the Insolvent Act. On examination of all the cases it appears to me that where a creditor does not seek to take any benefit from the act, the discharge of the debtor does not operate as a statutable release of the debt due before the debtor applied to be discharged. *Jackson v. Davison* (a) is distinguishable: there the party was an opposing creditor. In *Carpenter v. White* (b), the defendant being about to take the benefit of the Insolvent Act, the plaintiff requested him not to insert his debt in the schedule, as he would never call on him for its amount. There was, therefore, an express promise not to enforce his demand. But, then it is said that a fraud has been committed by the plaintiff on his client, and, putting a reasonable construction on the question left to the jury, and the answer given by them, we must take it that they have found that the plaintiff was guilty of such fraud. But we are all of opinion, that that finding is not warranted by the evidence; for there was proof that the defendant never expected that her debt to *Howard* would be discharged. We think, therefore that, on this point, there should be a new trial. As-

(a) 4 B. & A. 691.

(b) 3 B. Moore, 231.

suming even that such fraudulent omission would be a defence to the present action, it may be questionable whether it ought not to have been specially pleaded.

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PARKE J. I also think that there ought to be a new trial. The jury have found in effect, that the plaintiff was guilty of fraudulent conduct in wilfully concealing his debt, and preventing its being inserted in the schedule. I think that finding was not warranted by the evidence, and that, upon this ground, there should be a new trial. It has been said, that even if the debt was omitted by the plaintiff with the defendant's consent, that would be a fraud upon the creditors at large, upon the authority of *Jackson v. Davison* (a); but there the plaintiff was one of the opposing creditors. A creditor who comes in under the act, and at the same time takes from the debtor a security for his debt, commits a fraud against the policy of the act. So a creditor who is a party to a composition deed, and thereby holds out to the rest of the creditors, that he comes in on equal terms with them, commits a fraud if he take a security for the payment of his whole debt. But it is no fraud in a creditor, not a party to the deed, to endeavour to obtain payment of his debt. Whether the fact of the plaintiff having fraudulently, and in breach of his duty to the defendant, omitted to cause the debt to be inserted in the schedule (if it be found by the jury on sufficient evidence) will be a defence to the present action, may be a question for the Court to decide on a future occasion. The argument, that in order to avoid circuitry of action, it ought to be a defence, has great weight with me. In

(a) 3 B. Moore, 231.

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HOWARD
against
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a note to *Turner v. Davies* (a), it is laid down, “that a cause of action against a plaintiff will be no bar to an action by him for avoiding circuitry of action, when the recovery in both actions is not equal.” If so, the question would be, whether, in an action brought by *Bartolozzi* against *Howard*, for causing his debt to be omitted, that debt would be the measure of damages (b). I do not, however, mean to give a final and decisive opinion upon that point.

TAUNTON J. I also think that there ought to be a new trial, because I entertain great doubts whether the jury were justified by the evidence in finding that the plaintiff fraudulently omitted his debt.

PATTESON J. I think, upon the whole, the finding is not warranted by the evidence; and therefore, there ought to be a new trial.

Rule absolute for a new trial.

The cause was tried a second time, before *Denman* C. J., at the *Middlesex* sittings after *Trinity* term 1833, when nearly the same evidence was given; and the Lord Chief Justice told the jury that the only question was, whether the plaintiff had induced the defendant to leave the debt out of the schedule, and that the onus of proving that lay on the defendant; and he directed them to find for her, if they were satisfied, on the evidence, that the debt had been omitted by the plaintiff's procurement. The jury found for the defendant. No motion was made in this cause in the ensuing term.

(a) 2 *Wms. Saund.* 150.

(b) See 7 G. 4. c. 57. s. 57.

1833.

The KING *against* The Justices of HERTFORDSHIRE.Thursday,
January 31st.

SOLOMON BAXTER, intending to appeal against a poor-rate, served his notices in due time for the *October* sessions for *Hertfordshire*, 1832, and attended there ready to try, and to prove notice. The appeal being called on, counsel appeared for the respondents, and prayed a respite, alleging that the respondents had not had time to prepare their defence to the grounds of appeal stated in the notice, which were fifteen in number. The appellant opposed the respite; but it was granted, on payment of costs. Notice of appeal was not proved, nor an admission of it required. One of the notices was handed by the respondent's counsel to the clerk of the peace, and was thereupon (as the appellant represented) filed with the records of the sessions; but the respondents alleged that it was merely furnished to the clerk of the peace for his convenience, to assist him in making out the order of respite. This order (which set forth the grounds of appeal stated in the notice) was served on the churchwardens and overseers of the respondent parish on the 21st of *December*; but they had no further notice of appeal. At the next sessions, (31st *December*) the appeal was called on, and the respondents' counsel objected to its being heard without proof of the original notice. This the appellant was not prepared to give, conceiving that the fact had been admitted at the former sessions, and proof of it now was unnecessary; but he offered to prove the order of respite.

Notice was given of appeal against a poor rate, and the respondents attended at the sessions and prayed a respite, alleging that they had not had time to prepare their defence to the matters stated as grounds of appeal. The appellant opposed the respite; but it was granted, no notice of appeal having been proved or expressly admitted. An order of respite was made out, embodying the grounds of appeal stated in the notice: Held, that, at the following sessions, the appellant was entitled to be heard without proving any notice of appeal.

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—
The KING
against
The Justices of
HERTFORD-
SHIRE.

The sessions held this insufficient, and confirmed the rate with costs. A rule nisi was afterwards obtained in this Court for a mandamus to the justices to enter continuances and hear the appeal.

Ryland now shewed cause, and contended, that upon the clear principles of law on this subject, the respondents were entitled to require proof of the notice, which was necessary to give the court jurisdiction; that the handing of a copy to the clerk of the peace in the manner here stated could make no difference; and that the parties stood in the same situation as to this point at the second session as at the first.

Platt, contra, argued that the jurisdiction had been admitted, and proof of the notice dispensed with, by the conduct of the respondents at the first sessions.

Per Curiam. (a) The respondents had acted upon the notice so as to make further proof unnecessary. The sessions ought to hear the appeal.

Rule absolute (b).

(a) *Denman C. J., Littledale, Tnunton, and Patteson Js.*

(b) See *Rex v. The Justices of the West Riding*, Michaelmas term, 1833.

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The KING *against* The Justices of CARMAR- *Thursday,*
THENSHIRE. *January 31st.*

TWO justices, on the 25th of *August* 1832, made an order for the removal of a pauper and her children from the parish of *Mothvey*, in the county of *Carmarthen*, to the parish of *Llywell*, in the county of *Brecon*. The order was directed “to the churchwardens and overseers of the poor of the parish of *Llywell*,” and after adjudging that the lawful settlement of the paupers was in the parish of *Llywell*, it proceeded in the usual form to require “the said churchwardens and overseers of the poor of the said parish of *Llywell*” to receive and provide for the paupers.

The parish of *Llywell* is divided into three hamlets, viz. *Treganmaur*, *Traganlaes*, and *Slydach*, each of which maintains its own poor, and has separate churchwardens, separate overseers of the poor, and separate rates. Appeals have frequently been tried against orders of removal between the three hamlets at the *Brecon* quarter sessions. There are no such officers as churchwardens or overseers for the whole parish of *Llywell*. On the 27th of *August* 1832, the paupers named in the order of removal, were delivered by an officer of the removing parish of *Mothvey* to one of the overseers of the hamlet of *Treganmaur*, together with the order of removal. The overseer received the paupers, but at the next quarter sessions, held in *October* 1832, an appeal against the order of removal was duly lodged and respited on behalf of the churchwardens and overseers of the hamlet

An order of removal “to the parish of *L.*” was directed “to the churchwardens and overseers of the parish of *L.*” There were no such officers, but the parish was divided into three hamlets, *A. B. and C.*, each maintaining its own poor, and having separate officers. The pauper, with the order, was delivered by the officers of the removing parish to the officers of the hamlet of *A.* : Held, that a notice of appeal given in the name of the officers of the hamlet of *A.*, and reciting the order to be for removal to the hamlet of *A.*, in the parish of *L.*, could not, under these circumstances, be objected to by the respondents, and that the appeal ought to have been heard.

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of *Treganmaur*: and on the 22d of *December* 1832, the following notice of appeal was duly served upon the churchwardens and overseers of *Mothvey*: “To the churchwardens and overseers of the poor of the parish of *Mothvey*, in the county of *Carmarthen*. This is to give you notice, that we the churchwardens and overseers of the poor of the hamlet of *Treganmaur*, in the parish of *Llywell*, in the county of *Brecon*, do intend at the next quarter sessions of the peace to be held in and for the said county of *Carmarthen*, to prosecute an appeal which was duly lodged at the last quarter sessions against an order of, &c. for and concerning the removal of *Jane Jones* and her four children (describing them by their names, &c.) to our said hamlet of *Treganmaur*, in the said parish of *Llywell*, in the county of *Brecon* aforesaid, from your said parish of *Mothvey*, in the said county of *Carmarthen*.” The appeal came on at the sessions held in *January* 1833, and on proof of service of the notice of appeal, an objection was made on behalf of the respondent parish that the notice was improper, inasmuch as it ought to have been given by the overseers of the parish of *Llywell*, to whom the order was directed, and not by the officers of the hamlet of *Treganmaur*; and a further objection was made, that the notice stated the order to be an order for the removal of the paupers to the hamlet of *Treganmaur*, in the parish of *Llywell*, whereas the order appeared to be an order for their removal to the parish of *Llywell*.

The justices at sessions determined against hearing the appeal, on the ground of the informality of the notice, on the objections above stated, and the appeal was accordingly dismissed. A rule nisi for a mandamus to
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the justices to enter continuances and hear the appeal was afterwards obtained by *E. V. Williams*, against which

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Whitcombe now shewed cause. The sessions had no jurisdiction to hear the appeal, because the order appealed against was an order upon the officers of the parish of *Llywell*, whereas the notice of appeal was given by the officers of the hamlet of *Treganmaur* in the parish of *Llywell*. The notice ought to have been given in the name of "the churchwardens and overseers of the parish of *Llywell*," upon whom the order was made. Justices of the peace are not obliged to take notice of the divisions of parishes into townships and hamlets, *Spitalfields v. Bromley* (a). This is not like the case of *Rex v. Kirkby Stephen* (b), because there the name of the township to the overseers of which the paupers were delivered, as well as that of the parish, was *Kirkby Stephen*. Again, there is a fatal variance between the description of the order of removal in the notice of appeal, and the order itself. The notice describes it as an order upon the officers of the hamlet of *Treganmaur* in the parish of *Llywell*; whereas, in fact, no such order has ever been made, but only an order upon the officers of the parish of *Llywell*.

The *Solicitor-General* and *E. V. Williams* contra. As to the first objection, that the appeal ought to have been in the name of the churchwardens and overseers of the parish of *Llywell*, to whom the order was directed, the

(a) 2 *Bolt.* pl. 890. 6th ed.(b) *Burr. S. C.* 664.

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statute 9 G. 1. c. 7. s. 8. requires only that the notice shall be given “ by the churchwardens or overseers of the poor of such parish or place who shall make such appeal; ” and that has been done here. Besides, there are no such officers in existence as those to whom the order was directed. As to the other objection, that the order does not correspond with that described in the notice, the respondents cannot have been misled by such a variance, for there was but one order. And the respondents, by delivering the paupers with the order to the overseers of the hamlet of *Treganmaur*, have treated it as an order upon the officers of the particular hamlet; and are estopped from saying now, that it does not, in substance, amount to such an order.

DENMAN C. J. We are of opinion that the quarter sessions ought to have heard the appeal. The notice of appeal could not mislead the parish officers of *Mothvey*, to whom it was addressed. It recited the order of removal sufficiently; the names of the paupers, the removing parish, and the part of the parish of *Llywell* to which the removals were made under the order, although the order professed to remove to the parish at large. The parish of *Mothvey* is estopped by its own acts from availing itself of the objection. The removal was by the order to the parish at large, but the service of that order was on the hamlet. Parties, who have thus acted upon their own order, cannot afterwards say, that an appeal against it, under such a notice at this, shall not be heard.

LITTLE-

LITTLEDALE, TAUNTON, and PATTESON Js. concurred.

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Rule absolute (a).

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SHIRE.

(a) It may be convenient here to add the following case, decided in Trinity term, 1833.

The KING against The Inhabitants of BINGLEY.

Tuesday,
June 4th, 1833.

(Before DENMAN C. J., LITTLEDALE, PARKE, and PATTESON, Js.)

UPON appeal against an order of two justices, whereby *Isabella Rushworth*, widow, and her children, were removed from the township of *Heslington St. Lawrence*, in the East Riding of *Yorkshire*, to the township of *Bingley*, in the West Riding, the sessions confirmed the order, subject to the opinion of this Court on the following case: —

The paupers were removed from *Heslington St. Lawrence*, to the township of *Bingley*, under the above order. The parish of *Bingley* consists of several townships, of which the township of *Bingley* is one. The parish maintains its own poor collectively, and there are no separate overseers for the township of *Bingley*. The question was, whether the order of removal to the township of *Bingley* could be supported.

Paupers were removed to the township of *Bingley*; the township does not maintain its own poor, but is in the parish of *Bingley*, which does: Held, that the order was informal, but the sessions might amend it.

Wrangham in support of the order of sessions. The overseers have recognized the order as made on them, by appearing and defending the appeal. At all events, the defect was one of form, and might have been amended by the sessions according to the stat. 5 G. 2. c. 19. s. 1., if the appellants had made this objection before the case was heard on the merits; *Rex v. Amlwch* (4 B. & C. 757.).

Starkie and *R. Hildyard* contra. The objection was properly taken at the sessions. The defect in the order was caused by the default of the removing parish, and they ought to have applied to have it amended. Besides, it is a defect not of form but of substance, the removal being to a district which has no funds to maintain its own poor. The order was therefore not amendable; *Rex v. Swalclyffe* (2 Bott. pl. 786. 896. sixth edit.).

Cur. adv. vult.

DENMAN C. J. now said (after referring to *Rex v. The Justices of Carmarthen*, as in some degree analogous), that the present order was informal, but might have been amended at the sessions; and that being so, the Court thought that the case should go back to the sessions, that the amendment might be made.

1833.

Thursday,
January 31st.

BUNNEY and Another *against* POYNTZ.

id. 1830
W. 650 P. having given a general authority to D. to sell hay for him, D. advertised a sale, by the conditions of which a deposit was to be paid, and three months credit given on approved security for the remainder, and the lots were to be taken away within forty weeks of the sale. D. sold the hay to S., and took his promissory note for the price. S. applied to D. for leave to cut some of the hay, and it being granted, cut and took away part, but he was afterwards forbidden by D. to remove the residue. D. indorsed the note, and discounted it at his bankers, who credited him with the amount, minus the discount; it was afterwards dishonoured. D. having become bankrupt, it was agreed between the bankers and S. that the latter should sell them the residue of the hay, and that they should pay him part in money and return him his note in satisfaction of the residue. The bankers, within forty weeks after the sale, demanded the hay of D.'s principal, (P.), who refused to deliver it. In trover brought against P. by the bankers for the hay:

TROVER for hay. At the trial before *Littledale J.*, at the Spring assizes for the county of *Berks*, 1832, the following appeared to be the facts of the case:—The plaintiffs were bankers at *Newbury*. The defendant was the owner of a farm, which was managed by one *Cameron*, his bailiff. By *Cameron's* direction, in *October*, 1829, one *Davis* was ordered to sell, by auction, hay, and other farming produce, then on the defendant's premises. The whole of the hay was not sold; and *Cameron* gave general directions to *Davis* to make the best that he could of the residue. In pursuance of these directions, *Davis* advertised another sale, which took place on the 5th of *January*, 1830. By the conditions of that sale, it was stipulated, that 20 per cent. deposit should be paid, and three months' credit should be given, on approved security, within seven days of the sale, for payment of the remainder. The lots were to be taken away, with all faults, at the buyer's expence, within forty weeks after the sale. *Davis* sold to a person named *Smallbones*, and, without requiring any deposit, took the joint and several promissory notes of S., and one *Drew*, bearing date the

Held, first, assuming P. to have had a lien after the sale, and after the vendee had given his promissory note for the price of the hay, that that lien was not divested by reason of the vendee having removed part of the hay, it not appearing that this part-delivery to him was by way of delivery of the whole.

Secondly, that P. had no lien, because he was to be considered as having been paid for the hay by reason of his agent having taken the vendee's promissory note, and discounted it, and its being outstanding in the hands of the plaintiffs.

6th of *January* 1830, for 70*l.*, payable at three months to *Davis's* order at the *Newbury* bank. *Smallbones* soon after the sale applied to *Davis* for leave to cut some of the hay, and it was granted; and he, *Smallbones*, cut and took away part of the hay; he was afterwards (whether before or after the note became due did not distinctly appear) forbidden by *Davis* to remove the residue. *Davis* indorsed the note, and the plaintiffs, who were his bankers, discounted it, and credited him with the amount, minus the discount; it was afterwards dishonoured. In *June* 1830, *Davis* became bankrupt. The plaintiffs then called on *Smallbones* to pay the note; he could not, but proposed to sell them the hay; and on the 6th of *September* 1830, by agreement in writing, *Smallbones* sold, and the plaintiffs bought the hay, still being on the premises of the defendant, for 75*l.*; and it was agreed, that they should pay 5*l.* in money, and the note should go in satisfaction of the residue. Within forty weeks after the sale to *Smallbones*, the plaintiffs sent to the defendant and demanded the hay, but he refused to deliver it. The learned Judge told the jury that the plaintiffs could only stand in the situation of *Smallbones*, and as to that, he was of opinion that, during the time the note was running, *Smallbones* might have cut and carried away all the hay; but that if he voluntarily allowed it to remain after the dishonour of the note, the lien of *Poyntz* the vendor revived; although, if *Smallbones* had been prevented from removing it during the currency of the note, such prevention was wrongful on the part of the vendor, and he could not take advantage of such wrong so as to retain a right of dominion over the hay. And he told the jury to find for the defendant, if they were of opinion, on the evidence, that he, or *Davis* his agent, interfered to prevent *Smallbones* from removing the hay
before

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before the expiration of three months after the sale, otherwise for the plaintiffs. The jury having found for the defendant,

Talfourd, in last *Easter* term, moved for a new trial on the ground of misdirection. First, the delivery of part of the hay to *Smallbones* prevented the lien of the vendor from reviving. In *Slubey v. Heyward* (a), delivery of part of a cargo of goods was held to be, in point of law, a delivery of the whole, so as to divest the vendor's right to stop in transitu. In *Hammond v. Anderson* (b) a number of bales of bacon, lying at a wharf, was sold for one entire sum to be paid for by a bill at two months; and the vendor gave an order to the wharfinger to deliver them to the vendee, who went to the wharf, weighed the whole, and took away part; and it was held that the vendee, by taking away part, (the goods having been sold by one entire contract,) had taken possession of the whole, so as to divest the vendor's right to stop in transitu. Secondly, the negotiation of the note completed the right of the purchaser to the delivery, and the lien, if it existed before, could not revive, while the note was outstanding in the hands of an indorsee.

LORD TENTERDEN C. J. I am of opinion, that under the circumstances of this case the lien of the vendor was not divested by reason of the vendee's having taken away part of the hay. The delivery of part of a cargo made in the progress of and with a view to the delivery of the whole, has, indeed, been held to divest the vendor's right of stopping in transitu. In *Slubey v. Hey-*

(a) 2 H. Bl. 504.

(b) 1 New Rep. 69.

ward,

ward (a), the delivery of part was held to be a delivery of the whole, on the ground that neither before nor at the time of the delivery, did there appear any intention to separate part of the cargo from the rest. Now, here, the vendee asked permission of the vendor's agent to take away only a part of the hay; so that there was a manifest intention that that part should be separated from the residue. Upon the other point, there may be a rule.

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PARKE J. In *Hammond v. Anderson* (b), the goods were in possession of a wharfinger, and the vendor gave a general order for the delivery of the whole, and the vendee under that order went to the wharf and took away part; he had actual manual possession of the whole, and took upon himself to separate a part from the residue. Here the intention of *both* parties was to separate the part delivered from the residue, and the vendee took possession of part only.

Justice in this term shewed cause. The case was left correctly to the jury, for the right of lien, though suspended during the period of credit, revived as soon as that expired. In *New v. Swain* (c), *Bayley J.* says, "Where the owner of goods sells on credit, the buyer has a right to immediate possession; but if he suffer the goods to remain until the period of payment has elapsed, and no payment in fact is made, then the seller has a right to retain them." Then the question is, whether, the note having been given by *Smallbones* to *Davis*, and indorsed by him to, and discounted by, the plaintiffs, the lien is taken away. *Smallbones* not having performed his

(a) 2 H. Bl. 504.

(b) 1 New Rep. 69.

(c) 1 Danson & Lloyd's Merc. C. 193.

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part of the contract, and having permitted the hay which he might have removed, to remain till the time of credit expired, the defendant was then entitled to resume his dominion over it, notwithstanding the negotiation of the note.

Talfourd contrà. *Poyntz*, the defendant, has no lien, because he has been paid. *Davis*, his agent, having taken a note from *Smallbones* for the price of the hay, and negotiated it, the transaction is, in effect, the same as if *Davis* had taken cash from *Smallbones*. The outstanding note would be a defence to an action by the vendor for the price, *Kearslake v. Morgan* (a). Suppose *Poyntz* himself had sold the hay, taken the note, obtained the discount, and parted with the note to the plaintiffs, and they had then bought the hay of *Smallbones*, could *Poyntz* afterwards have refused to deliver the hay? Where the owner of goods had a lien on them until the delivery of good and approved bills for the freight, took a bill of exchange for the freight, and afterwards (though he objected to it at the time) negotiated it, it was held that such negotiation amounted to an approval of the bill, and was a relinquishment of his lien on the goods, *Horncastle v. Farran* (b). Here there has been payment to *Davis*, and payment to him is payment to *Poyntz*. The loss arises from the misconduct of *Davis*; and the question being, which of two innocent parties is to be damnified, *Poyntz*, whose agent he was, ought to suffer.

Cur. adv. vult.

The judgment of the Court was now delivered by *Denman* C. J., who, after stating the facts of the case, proceeded as follows: —

(a) 5 T. R. 513.

(b) 3 B. & A. 497.

It was insisted in argument, that *Davis*, the agent of the vendor, having taken in payment for the hay the promissory note of the vendee, and negotiated it with the plaintiffs, and that note being outstanding in their hands, that was as against the vendor, substantially a payment to him, and he could have no right to retain the hay. We think that argument right, and that the defendant, under the circumstances of this case, must be considered as having been paid for the hay, and can have no right to retain it. The manner in which *Davis* applied the money which he received is wholly immaterial as between the parties to this action. The rule for a new trial must be made absolute.

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against
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Rule absolute.

The KING on the Prosecution of DAUBUZ,
against PENPRASE and Others.

Thursday,
January 31st.

FOLLETT, in this term, obtained a rule calling upon the prosecutor to shew cause why the defendants should not be at liberty to appear and plead to this indictment by a clerk in court; and why the prosecutor and the defendants should not be restrained from assigning error on the ground of such appearance and pleas not being entered by the defendants in their proper persons.

The indictment was found at the quarter sessions for the county of *Cornwall*, and was on 7 & 8 G. 4. c. 30. s. 7., for maliciously and feloniously pulling down and

On indictment for felony, removed by certiorari, the Court, under special circumstances, ordered that the defendants should be at liberty to plead by a clerk in court, and that they and the prosecutor should be restrained from bringing error on account of the pleas being so taken.

But in the same case the Court refused to allow a suggestion to be entered for the purpose of removing the trial from *Cornwall* into another county, on the alleged ground that titles to duchy property were likely to come in question, with respect to which prejudices existed in *Cornwall*, and that an impartial trial could not be had there.

destroying

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destroying a certain erection used in conducting the business of a mine, the property of the prosecutor; and for other like acts, charged in different counts. It was stated on behalf of the defendants, that *Penprase* was mining agent to *Henry Crease*, who, in right of his wife, claimed to be entitled to toll and farm of tin in certain lordships in the duchy of *Cornwall*, and to certain tin-mines in those lordships, under a duchy lease; that *Penprase*, as such agent, had given notice to the agent of the prosecutor, that if certain whims and other mining materials, claimed by him, on one of the above-mentioned mines (which had not lately been worked), were not removed within a week, he, *Penprase*, should remove them, to make room for machinery about to be erected for *Crease*; that the notice being disregarded, he had a public survey made of the prosecutor's machinery, and employed the other defendants, as workmen by contract, to take it away; and they accordingly, on the 15th of *December* 1832, removed it carefully to a short distance; that they acted without malice, and, as they considered, lawfully; that on the 27th the workmen who had been so employed were charged before a justice with the offences above stated, and by him committed to prison for felony, but they were afterwards admitted to bail by order of a judge of this Court. The indictment had been removed into this Court by certiorari at the instance of the defendants (*a*), on affidavits, stating, in addition to the above facts, that it was apprehended questions would be raised on the trial concerning the rights of *Crease* and his wife, and also of the crown, which could not be impartially tried at the sessions by reason of the interest which many magistrates and other

(a) See *Rex v. Thomas*, 4 M. & S. 442.

gentlemen

gentlemen of the county had in the decision of those matters. It was further deposed, in support of the present application, that the defendants all resided in *Cornwall*, 250 miles from the city of *Westminster*, and were unable to bear the expense of coming up to plead in person.

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Follett, in moving for the rule, stated that the application had, in the first instance, been made to *Parke J.*, who thought it reasonable, but desired that it should be referred to the Court. He also stated, that an order in the terms of the proposed rule had, in one instance, been made by Lord *Tenterden (a)*.

The Court granted a rule nisi; and on a subsequent day of the term (26th *January*) the rule was made absolute, no cause being shewn.

On the same day *Follett* again moved in this case, for leave to enter a suggestion on the record, that a fair and impartial trial could not be had in *Cornwall (b)*, for the

(a) The KING against BLACKBURN and Others.

March 6th,
1832.

AN order in the above terms was made by Lord *Tenterden* in vacation, in the case of parties indicted for felony on 7 & 8 G. 4. c. 30. s. 6. The prosecutor was unwilling to consent to that part of the order which precluded him from bringing error; but Lord *Tenterden* said, that if this were refused he would stay the proceedings from the Spring to the Summer assizes; upon which the prosecutor consented. The plea was entered on the record as follows:—“And now, that is to say, on the 11th day of *January* in this same term, before our said lord the king at *Westminster*, come the said *Thomas Blackburn*, &c. by *Peregrine Dealtry* their clerk in Court, in pursuance of a rule of the Court of our said lord the king before the king himself for that purpose, and having heard the said indictment read they severally say that they are not guilty,” &c. (See 2 *Hale's P. C.* 216.: *Com. Dig. Attorney*, (B) 4, 5, 6., and the authorities there cited: *Beecher's case*, 8 *Rep.* 58. b.)

(b) See the form of suggestion in *Rez v. Hunt*, 3 B. & A. 448.

purpose

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purpose of carrying the trial from that county into some other. The affidavits in support of this application again stated the circumstances exculpatory of the defendants, the expectation that some question of title adverse to that of the duke's lessee would be raised by the prosecutor, and the belief of the defendants that, "owing to the biassed judgments and great influence of the many parties connected with or otherwise interested in mines situate within the duchy," they could not have a fair trial in *Cornwall*, or in *Devonshire*, over a considerable part of which the right of the Duke of *Cornwall* and of those claiming under him extends. This application had been first made in the bail-court; but *Parke J.*, who sat there, doubted whether it could be granted. [*Patteson J.* referred to a late case of an indictment for felony, in which the trial was carried from the town and county of *Southampton* to the county of *Hants (a).*]

DENMAN

Trinity term,
1832.

(a) The KING against WILLIAM RUSSELL.

38.1.1.4 352

FOLLETT, on behalf of the defendant, moved (in the bail court) for a certiorari to remove any indictments that might be found against him at the sessions for the town and county of *Southampton*, for stealing two guns, the property of *William Burnett*. The affidavits on which the motion was made, tended to exculpate the defendant, and to shew that the magistrates of *Southampton* had acted rigorously in committing him for felony, and refusing bail; and it was sworn that an unfavourable impression had been created against the defendant in the town, and had been openly expressed (by applause and hisses) while he was under examination.

Saunders afterwards shewed cause, and put in counter-affidavits.

The Court made the following rule: — "It is ordered, that the rule made on *Monday* last, that the said *William Burnett* should shew cause why a writ of certiorari should not issue to remove into this Court from
the

DENMAN C. J. I think the Court cannot presume that, in a case of felony, a jury of twelve indifferent men could not be found in *Cornwall*. In a case of misdemeanour popular feeling might perhaps operate to the prejudice of defendants, but we cannot suppose it on a charge of felony.

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The King
against
PENFRASE.

LITTLEDALE, TAUNTON, and PATTESON, Js., concurred.
Rule refused.

The defendants were tried at the next assizes for *Cornwall*, and acquitted.

the sessions for the town and county of *Southampton*, all and singular indictments which may be preferred there against the said *William Russell* for feloniously stealing, taking and carrying away two guns, the goods and chattels of the said *W. B.*, be discharged, the said *W. B.* hereby undertaking to prefer such indictments at the assizes to be holden in and for the county of *Southampton*, and not at the sessions for the said town and county, and the said *W. R.* hereby undertaking to pay the said *W. B.* or his attorney the extra costs occasioned by preferring and trying such indictments at the assizes for the said county of *S.*, instead of the sessions for the said town and county, such costs, if necessary, to be taxed by the coroner and attorney of this Court."

The reporters were favoured with notes of this case, and *Rex v. Blackburn and Others*, from the Crown Office. The law and authorities on the subject of removing indictments for felony, will be found further discussed in *Rex v. Holden and Fisk*, Trinity term, 1833.

1833.

COLEBROOK, Baronet, and Others *against*
LAYTON, Clerk.

selling A clergyman ~~purchasing~~ an annuity, agreed that it should be charged on his benefice, and the payment secured by a bond and warrant of attorney, with a judgment to be entered up thereon, for the purpose of charging the benefice. By the deed of grant the annuity was made payable on certain days and chargeable on the benefice, with a power of distress, &c. :

It also contained a demise of the benefice to a trustee, with a power in default of payment to receive the tithes, rents and profits, &c. It was thereby also declared, that the bond and warrant of attorney (referred to in the deed as having been already prepared, and meant to bear even date with, and to be executed and given at the same time as the deed,) and the judgment to be entered up thereon, should be further securities for the annuity; and that immediately after such judgment the creditors might sue out execution, and do such other acts as might be necessary for obtaining a sequestration: and that as often as the annuity should be in arrear, they might put in force such writ of sequestration. The condition of the bond, (after reciting the agreement for purchase of the annuity, and for securing the same by such bond, warrant of attorney, and judgment, reciting also the deed of grant,) was declared to be for the due payment of the annuity on certain days. The warrant of attorney gave authority to receive a declaration at the suit of the plaintiffs, in an action of debt on a bond, describing it as a bond of even date with the warrant of attorney, executed by the grantor of the annuity, and given to the grantees, and to suffer judgment. The defeazance recited, that it was given to secure the payment of an annuity of the amount mentioned in the bond, payable on the same days as in the condition of the bond was expressed.

On a motion to set aside the judgment on this warrant of attorney, on the ground that it was a charge on the benefice: Held, that this did not sufficiently appear, the reference in the warrant of attorney to the bond amounting to no more than a description of the bond, its date, the parties to it, and the time at which the annuity was to be paid, and not incorporating the terms of the deed of grant (recited in the bond) with the warrant of attorney, so as to make the latter operate as a charge on the benefice; and this being an application to set aside a judgment for irregularity, the rule was discharged with costs.

demised

1 Bac. 237.

A RULE was obtained, calling upon the plaintiffs to shew cause why the judgment in this case, which was upon a warrant of attorney, should not be set aside. The rule was grounded upon an affidavit of the defendant, stating that he was the vicar of the vicarage and parish church of *Chigwell* in *Essex*, and curate of the perpetual curacy of *Theydon Bois* in that county; that the plaintiffs were "The trustees of the estate and property of the United Empire and Continental Life Association;" that at the time of the agreement for the purchase of the annuity thereafter mentioned, it was expressly agreed, that the same should be charged and chargeable upon the above mentioned ecclesiastical benefices, which were to be

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 COLEBROOK
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demised to a trustee for a certain term of years; and that payment of the annuity should be further secured by a bond and warrant of attorney of the defendant, with a judgment to be entered up thereon, "*for the purpose of charging deponent's respective benefices with the payment thereof in manner thereafter mentioned.*" The affidavit then set out an indenture, dated the 3d of *September* 1824, to which there were several parties, and whereby, in consideration of the sum of 2000*l.* paid by the plaintiffs to the defendant, the latter granted to the plaintiffs an annuity of 237*l.* 2*s.*, to be yearly issuing and payable by, and from, and out of, and charged and chargeable upon the said several benefices, and the glebe lands, messuages, tithes, tenements, oblations, obventions, profits, and emoluments thereof; such annuity to be paid quarterly. The deed contained the usual covenant for payment of the annuity; a power of distress if the same were in arrear twenty-one days; or if in arrear thirty days, a power to enter upon and take and receive the rents and profits of the respective livings, and satisfy the annuity; and it contained a demise by the defendant of the same benefices to one *Christopher Godmond* (a trustee on behalf of the plaintiffs) to hold to him for ninety-nine years (if the defendant should so long live), upon trust, until default of payment of the annuity, to permit and suffer the defendant to take the tithes, oblations and obventions, rents and profits thereof; and after default, then upon trust to take and receive the same to himself, the said *Christopher Godmond*; and thereout, or by demising, selling, leasing, or mortgaging the same, to raise sufficient to satisfy the said annuity and such parts thereof as should from time to time become due; and there was a power to redeem the annuity

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at a sum agreed upon. The deed further contained an agreement or declaration between the plaintiffs and defendant, that the bond and warrant of attorney (referred to in the said deed as having been already prepared, and intended to bear an even date with and to be executed and given at the same time as the deed and the judgment to be entered up on the warrant of attorney) should be further securities for the payment of the annuity; and that immediately after judgment should be so entered up, the plaintiffs might sue out and prosecute such execution or executions by virtue of the said judgment, and do all such other acts, as might be necessary for obtaining a sequestration or sequestrations of the said vicarage and curacy; and that as often as the annuity should be in arrear, they might proceed under such sequestration and sue out execution upon or by virtue of the said judgment by fieri facias de bonis ecclesiasticis, or de bonis propriis, or any other writ whatsoever, or take such other proceeding thereon as they should think fit.

The affidavit further stated that the bond was in fact executed and the warrant of attorney given at the same time, and bore even date, with the aforesaid grant; *and that the warrant of attorney was given for the express purpose of charging the said vicarage and curacy with the payment of the annuity, and for the purpose of enabling the plaintiffs to sue out the before mentioned executions.* The bond was in the usual form. The condition thereof (after reciting the contract for the purchase of the annuity, and that it had been agreed that the same was to be secured by such bond and warrant of attorney and the judgment to be entered up thereon, and reciting the deed of grant) was declared to be
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for the due payment of the annuity during its continuance by even quarterly payments on certain specified days, and for paying in a certain event 2000*l.* for the repurchase thereof. The warrant of attorney authorized the parties named to appear for the defendant, and to receive a declaration at the suit of the plaintiffs in an action of debt on a bond (describing it as a bond of even date with the warrant of attorney, under the hand and seal of the defendant, and given to the plaintiffs) and to suffer judgment in such action in the usual manner. The defeazance to this warrant of attorney recited that it was given to secure the payment of one annuity of 237*l.* 2*s.*, during the life of the defendant, by even quarterly payments on the 3d of *March*, the 3d of *June*, the 3d of *September*, and the 3d of *December*, the first payment to be made on the 3d day of *December* next, “*as in and by the condition to the bond or obligation referred to by the said warrant of attorney is more particularly expressed in that behalf;*” and it authorized the plaintiffs when and as often as the annuity or any part thereof should be in arrear for the space of twenty-one days after the days appointed for payment thereof, to sue out such execution or executions upon or by virtue of the said judgment by one or more writ or writs of fieri facias de bonis ecclesiasticis, or de bonis propriis, or both, or any writ or writs, or to take and adopt such other proceedings, as they should think fit, for the recovery of the annuity and all costs.

Sir *James Scarlett* and *F. Pollock* shewed cause in the present term. There is no ground for setting aside this judgment. The validity of it depends solely on the warrant of attorney, and as there is nothing on the face

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of that instrument to shew it was given with intent to charge, and that it does charge, the benefices, contrary to the 13 *Eliz. c. 20.*, it is quite unobjectionable, although the consequence of any execution which may issue upon the judgment founded on it may be to affect the profits of the living. The want of any objection apparent upon the face of the warrant of attorney clearly distinguishes this case from *Flight v. Salter (a)*, and brings it within the principle recognized in the cases of *Gibbons v. Hooper (b)*, and *Wynne v. Robinson (c)*, and further sanctioned by the judgment of this Court in *Moore v. Ramsden (d)*.

Follett contra. It is not intended to question the correctness of the decision in *Gibbons v. Hooper (b)*, and the class of cases which have followed it. This is clearly distinguishable. The fair result of all the authorities is this: where the Court is satisfied that the warrant of attorney was given with an intent that it should operate as a charge upon, the benefice, there the judgment founded upon it cannot be supported: but where nothing appears necessarily leading to the conclusion that it was given with such intent, the judgment is free from objection, though the consequence may happen to be, that the profit of the living will probably be taken in execution. If this is the correct rule, and is to be applied to the present case, the judgment must be set aside. In the first place, it is sworn by the defendant (and is not denied) that the warrant of attorney was given for the express purpose of changing the defendant's vicarage and curacy, and of

(a) 1 B. & Ad. 673.

(b) 2 B. & Ad. 734.

(c) 4 Bligh, Parl. C. 27.

(d) 3 B. & Ad. 917. note (d).

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enabling the plaintiffs to sue out the executions mentioned in the grant, obviously meaning the obtaining sequestration immediately upon the execution of the deed. [*Littledale J.* Can we take this from the affidavit? We must look to the language of the warrant of attorney to ascertain whether it is or is not a charge upon the living.] The affidavits unanswered are sufficient evidence of the intent of the parties. At all events, the Court is not to look to the warrant of attorney alone. Here the deed of grant, the bond, and the warrant of attorney all bear even date, were executed and given at one and the same time, and all in pursuance of a previous agreement to that effect. They constitute together one assurance. If the recitals and powers contained in the deed were expressly contained in the warrant of attorney, it could not be disputed that the latter would be bad, but those statements are virtually and sufficiently incorporated with the warrant of attorney. It expressly refers to the bond, which it minutely describes, and the defeazance refers to it, for it is there stated that the warrant of attorney is given as a security for payment of the annuity in the manner more expressly pointed out by the condition of the bond. The bond too as distinctly refers not only to the deed of grant, but to the agreement previously made, and the stipulation relative to the several securities. The warrant of attorney so expressly refers to the bond, and the bond to the deed, as to make it clear that the warrant of attorney was given with intent to charge the benefices; and, if so, it is void. The ground on which the Court, in *Flight v. Salter (a)*, set aside the

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judgment, was, that the party giving the warrant of attorney had attempted to do indirectly what the law would not permit him to do directly; and that is equally applicable here, unless it is to be held indispensable that the intention of the parties to charge the living by the warrant of attorney should be expressed in so many words therein. *Gibbons v. Hooper* (a) cannot be said to govern the present case. There the warrant of attorney did not refer to the deeds, and there was nothing necessarily connecting the deeds with the transaction in respect of which the warrant of attorney was given.

LITTLEDALE J. I am of opinion that the rule must be discharged. In *Flight v. Salter* (b), it was expressly recited in the warrant of attorney, that it was given to secure the annuity which was to be charged on the living. Here the warrant of attorney does not refer to the deed of grant. It is in the common form which would be adopted for providing payment of an annuity secured by bond, but not charged, or intended to be charged, upon any living. It is true there is some incidental mention of the bond in the warrant of attorney. The warrant itself, instead of simply stating a declaration in an action of debt on bond, describes that bond by mentioning the date, and shewing it to have been given by the defendant to the plaintiffs; and the defeazance notices it by stating that the warrant of attorney is given to secure the payment of a certain annuity on given days, and that the first payment is to be made on the 3d of *December* then next ensuing, “as in and by the condition to the bond or obligation referred to by the warrant of

(a) 2 B. & Ad. 734.

(b) 1 B. & Ad. 673.

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attorney is more particularly expressed in that behalf." But this reference to the bond in the warrant of attorney amounts to no more than a mention of that instrument by way of identifying it as the bond on which the action is to be brought, and the mention of it in the defeazance to no more than a precise and distinct reference to the times for, and the commencement of, the quarterly payments. This does not bring the case within the authority of *Flight v. Salter* (a). The stipulation in the defeazance, that a fieri facias de bonis ecclesiasticis may be taken out for the arrears of the annuity is wholly immaterial. If any execution in consequence of arrears could have issued, that writ might have been resorted to as well as any other, without any express stipulation; and the permission given to make use of it was quite unnecessary.

TAUNTON J. I am of the same opinion. It is sufficient to say that I think this case governed by *Gibbons v. Hooper* (b), and the decisions which have followed it; but even without those authorities, I should have thought this warrant of attorney was not void under the 13 Eliz. c. 20, the primary object of which was to avoid leases made by persons not residing upon and serving their cures. Another of the reasons for passing it is given by Lord Kenyon in *Mouys v. Leake* (c). But without adverting to what are generally understood to have been the objects of the act, and looking at the language of the clause on which this application is founded, and which declares that all chargings of such benefices shall be void, I think that to bring the case within the statute there must be an actual charging; and that the intention

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(a) 1 B. & Ad. 673. (b) 2 B. & Ad. 734. (c) 8 T. R. 415.

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of the parties to charge, where no charge is actually made, is not sufficient. In *Flight v. Salter* (a) the warrant of attorney did operate as a charge on the benefice. There the warrant of attorney recited the deed and made it part of the warrant of attorney. The provisions of the deed in substance were, that *Flight* was to be at liberty *forthwith* to obtain a sequestration, though no default might have taken place in the payment of the annuity, and this sequestration was to be a continuing sequestration during the continuance of the annuity even though it should be regularly paid. After reciting this, the defeazance to the warrant of attorney expressly alleged, that that warrant was given, and judgment was to be entered up thereon, to the intent that a sequestration might be obtained and *continued, pursuant to the agreement before mentioned*. The present case is widely different. There is no reference at all in the warrant of attorney to the deed of grant, and the reference to the bond is no more than a description of the bond, its date, and the parties to it, and of the times at which the annuity is to be paid. Such a reference does not, because the bond itself also refers to the deed, so incorporate the deed with the warrant of attorney as to give rise to the objection which the Court relied upon in *Flight v. Salter* (a). There, when the terms of the warrant of attorney were acted upon, the plaintiff did charge the living, for he made the sequestration a continuing security for the growing payments of the annuity. In this case the warrant of attorney would authorize no such proceeding. The power to sue out a writ of fieri facias de bonis ecclesiasticis, does not alter the case;

(a) 1 B. & Ad. 673

no execution is to be sued out but when the annuity is in arrear. In such an event that writ, equally with any other, might have been sued out without any express authority provided by the defeazance.

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PATTESON J. I am also of opinion that this rule must be discharged. Without going the length of saying that the object and intent of the parties to the warrant of attorney must necessarily appear upon the defeazance to it, I am of opinion that it must appear that their intention of charging the benefice has in fact been accomplished; in other words, that the benefice is by the warrant of attorney so far actually charged, that the party to whom the warrant of attorney is given, following the authority which it confers, would, but for the provisions of the statute of *Elizabeth*, obtain an actual charge on the living. Now, whatever may have been the intention of the parties here, it is quite clear to my mind that they have not, by this warrant of attorney, charged the living. If it were their object, they have failed to do so. The defeazance only gives a power to issue a writ of *fi. fa. de bonis ecclesiasticis* in case the annuity is not paid, and then only for the arrears. If, by means of the writ, those arrears should be obtained, it would have no further operation, and any sequestration founded upon it would be at an end. For though it is said in the books that a sequestration is a continuing writ, by that is meant that it is a continuing execution for the purpose of levying a given sum, viz. that for which the writ of *fi. fa. de bonis ecclesiasticis* issues, and no further. That sum, in the present case, could only be the amount of arrears due. Even, therefore, if by referring to the deed, and gathering from that
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the intention of the parties, I should be of opinion that they meant the warrant of attorney so to operate as to create a perpetual charge on the benefice, it is sufficient to say they have not, by the warrant of attorney, carried that object into effect. The rule for setting aside the judgment must therefore be discharged.

Sir *J. Scarlett* applied that it might be discharged with costs.

LITTLEDALE J. This is an application to set aside a judgment for irregularity, the alleged irregularity being that the warrant of attorney is void, and that, consequently, there is nothing to support the judgment. Rules to set aside proceedings for irregularity, if discharged, are usually discharged with costs; and we think this case must follow the general rule.

Rule discharged with costs.

(a) This case was decided in the early part of the term, when *Denman C. J.* was absent, on account of a domestic affliction.

REGULA GENERALIS.

IT IS ORDERED, That in case a rule of Court or Judge's order for returning aailable writ of *capias* shall expire in vacation, and the sheriff or other officer having the return of such writ shall return *cepi corpus* thereon, a Judge's order may thereupon issue requiring the sheriff, or other officer, within the like number of days after the service of such order as by the practice of the Court is prescribed with respect to rules to bring in the body issued in term, to bring the defendant into Court by forthwith putting in and perfecting bail above to the action. And if the sheriff or other officer shall not duly obey such order, and the same shall have been made a rule of Court in the term next following, it shall not be necessary to serve such rule of Court or to make any fresh demand thereon, but an attachment shall issue forthwith for disobedience of such order, whether the bail shall or shall not have been put in and perfected in the mean time.

Signed by the fifteen Judges.

MEMORANDUM.

In the course of this term *Thomas Noon Talfourd*, of the *Middle Temple*, Esquire, was called to the degree of Serjeant at Law, and gave rings with the motto "*Magna vis veritatis.*"

END OF HILARY TERM.

C A S E S

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ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Third Year of the Reign of WILLIAM IV,

MEMORANDUM.

IN the course of the last vacation, *David Pollock*, *Philip Courtenay*, *John Blackburne*, and *William Henry Maule*, Esquires, were appointed His Majesty's Counsel learned in the law.

Monday,
Ap. il 15th.

CHAUVEL against CHIMELLI.

Plaintiff's attorneys gave defendant's attorneys their own undertaking as security for costs; the defendant

obtained a verdict and died, and judgment was entered up in his name within two terms: Held, that the attorney for such deceased party, having a claim against his estate in respect of the costs, might enforce the security, to satisfy such claims, without any *scire facias* having been sued out by the personal representatives.

F. POLLOCK, in *Michaelmas* term, obtained a rule, calling on the plaintiff's attorneys to shew cause why they should not pay to the defendant's attorneys 119*l.*, the taxed costs in this cause, pursuant to their under-

taking.

taking. The plaintiff residing abroad, the attornies for the defendant had demanded security for costs from the plaintiff's attornies; and the latter signed a memorandum, by which they undertook, as sureties for the plaintiff, to pay such costs, if any, as he should become liable to pay the defendant in that action. At the sittings in *London* after *Trinity* term, the defendant had a verdict; final judgment was signed on the 15th of *November*, and the costs were taxed, but between the verdict and judgment the defendant died. The plaintiff's attornies being called upon for the costs by the defendant's attornies, to whom the defendant had been indebted on account of the costs in a larger amount than 119*l.*, declined paying them, alleging that there was no person entitled to receive them till a *scire facias* should be sued out by the defendant's representatives.

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Sir *James Scarlett* now shewed cause, and contended that the attornies, if they paid these costs under the present circumstances, would do so in their own wrong, and could not recover them from the plaintiff.

F. Pollock, contra. The statute 17 *Car. 2. c. 8. s. 1.* authorizes the entering up of judgment in the name of a deceased party, within two terms after the verdict; and his attorney, having a lien for his costs, may avail himself of the statute to enforce his demand against those who have given security.

The Court (a), being of the same opinion, made the
 Rule absolute.

(a) *Denman C. J.*, *Littledale* and *Parke Js.* *Patteson J.* was gone to chambers. During this term, *Taunton J.* was absent on account of indisposition. *Patteson J.* sat in the Bail Court a *Nisi Prius* and at chambers.

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held the premises by the permission which he had requested, until notice. The company may surely enforce the same rights which any other landlord has when a term expires. There is no pretence of a claim for good-will.

Kelly and Tomlinson contra. This application is well grounded on section 19. of the statute. Section 17. applies to parties who are put out by the company before their terms expire; but section 19. (a) gives the right of claiming compensation to all who are prejudiced in “any interest whatsoever for good-will, improvements, tenant’s fixtures, or otherwise,” which they enjoyed at the time of the passing of the act, and which, but for the act, would still have been valuable. The infirmity of the title and smallness of the interest can only affect the amount of compensation. This case falls within the reasoning of the Court in *Ex parte Farlow* (b), and differs from *Ex parte Wright* (c), where the tenant had made a special agreement with his landlord to quit in any year at three months’ notice, and not to underlet or part with the premises without leave in writing. Here the party had a saleable good-will in *May* 1830, when the act passed; and even after the expiration of the lease he might properly consider himself a tenant from year to year. *Tritton*, during the continuance of his interest, would not have disturbed him, and the company did not take any step for that purpose till some time after the lease expired. [*Parke J.* The question is, whether the under tenant of a lessee whose term expired soon after

(a) See the clauses more fully stated in *Ex parte Farlow*, 2 B. & Ad. 342., and page 599. *post.*

(b) 2 B. & Ad. 341.

(c) Ibid. 348.

the passing of the act, is entitled to compensation for good-will.] He is in the same situation, in this respect, as other tenants; there was the same probability (but for the company's intervention) that his interest would continue. In *Ex parte Farlow* regard was had to the practice on the estate not to disturb yearly tenants.

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DENMAN C. J. We think there is no material distinction between that case and the present. The rule must be absolute.

LITLEDALE J. concurred.

PARKE J. There was here, as in *Ex parte Farlow*, a chance of the tenancy being continued.

Rule absolute (a).

(a) In *Cruttwell v. Lye*, (17 Ves. jun. 346.) where the question related to a carrier's premises, which had been sold "with the good-will of the trade," Lord Eldon said, "The good-will is nothing more than the probability that the old customers will resort to the old place." In *Ex parte Farlow*, *Ex parte Still*, *Ex parte Gosling*, (p. 596. post.), the interest in "good-will" rested upon a further contingency, viz. that the landlord would not remove the tenant. Such an interest, it may be presumed, would be too slight and precarious to be noticed at law or in equity, if it were not upheld (as the Court considered it to be in the three last-mentioned cases) by conclusive words in an act of parliament. That the tenant has no claim in equity against his landlord, on the ground of having made improvements (with the landlord's knowledge), in the expectation of having his term prolonged, is laid down by Sir William Grant, in *Pilling v. Armitage*, (12 Ves. jun. 87.) "These parties," he says, "independent of any promise, rested so much upon the faith that they should not be disturbed in the enjoyment, as their ancestors had not been for many years, that they thought themselves as safe as if they had a lease. But can I convert that hope into an actual engagement by the landlord?" — "For that purpose I must say that the true measure of justice is, that a landlord shall never turn out a tenant, if improvements have been made with the knowledge of the landlord, until the tenant shall be completely reimbursed."

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The following case, though decided later in the term, (*April 25th*,) may conveniently be added here.

The KING *against* The HUNGERFORD MARKET Company.

(Ex parte GOSLING.)

1833 - 465, 5 Under sections 17. and 18 & 466 19. of the *Hungerford Market Act* (see the preceding case) compensation was claimed by a party, who in 1825 became the assignee of a lease for fourteen years, granted in 1818, of premises on the estate purchased by the company. The lease contained covenants to yield up the premises, *with all fixtures and improvements*, at the end of the term, and *not to underlet or assign without leave*; but this latter clause had not been introduced in contemplation of any advantage

THIS was a similar application to the last, the party claiming compensation for his estate and interest in premises taken by the company, and for loss, &c. in respect of any interest whatsoever for good-will, improvements, tenant's fixtures or otherwise, which he had sustained or might sustain by the passing of the act, Mr. *Wise* (mentioned in the former cases) had demised the premises in question to *Thomas Day*, for fourteen years from the 25th of *March* 1818, at the rent of 80*l.* a year. *Gosling* purchased of *Day* the lease, good-will, and fixtures in *February* 1823, when the lease was duly assigned to him; *Day* informing him that he might rely on a renewal of the lease if he conducted himself well, as Mr. *Wise* never turned out a respectable tenant. *Gosling* made considerable improvements on the premises, where he carried on the business of a confectioner and pastry-cook: and it was stated in his affidavit, that while these were going on, *Gardiner*, Mr. *Wise's* agent, told him in conversation, that he might make himself

to be taken of it by the landlord with reference to the present act. The company suffered the lease to expire, and then turned out the tenant: Held, that he was entitled to have compensation assessed for the loss, if any, sustained by him in respect of good-will, or the chance of a beneficial renewal of his lease; but not for fixtures set up or purchased, or for improvements made by him, inasmuch as he had no legal interest in them.

Held, nevertheless, that these might be considered by the jury in estimating the chance of a beneficial renewal.

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easy as to a renewal of his lease, as Mr. *Wise* never turned away a good tenant. In *April* 1830, the company made an enquiry of *Gosling* as to the terms on which he would part with the property; and a correspondence followed, which continued after the passing of the *Hungerford Market* Act, but led to no result. The lease expired at *Lady-day* 1832, and the company then brought an ejectment against *Gosling*, and turned him out of possession. He further deposed, that in 1830, he could, as he believed, have sold his lease and good-will for several hundred pounds if the act had not passed; whereas, after its passing, they were of little or no value. He also stated that the custom on the estate, as he was informed and believed, had been not to dismiss tenants who conducted themselves well; mentioning an instance, among others, in which an individual and his ancestors had been tenants on the estate (in *Hungerford Street*) for upwards of two hundred years.

In answer it was sworn, that the premises in question were part of the estates purchased by the company of Mr. *Wise* pursuant to agreement entered into with him before, and completed after, the passing of the act, subject to certain outstanding leases, (mentioned in sect. 2. of the act) of which that in question was one. That the tenant, in and by that lease, covenanted to repair, &c., and at the end of his term to yield up the premises in good repair, *with all fixtures and improvements*; and *not to let, set, underlet or assign, without the landlord's consent* in writing; and there was a power of re-entry in case of breach: that at the expiration of the term the company had demanded possession, which being refused, they brought ejectment and obtained judgment; but *Gosling* still refused to give up the premises, alleging

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that he was not bound to quit till he had received compensation for his good-will: whereupon the company, after some delay, obtained a writ of possession and expelled him. *Gardiner*, Mr. *Wise's* steward, stated that proposals were made to him in that capacity by the company for the purchase of the estate in the beginning of 1824, and the negotiations continued till 1830; and that he had no recollection of having used the expressions stated by *Gosling*, but had told him, that Mr. *Wise* would be disposed to sell the estate to the company if they could raise enough money. He added, that the renewal of leases on the estate was always upon a valuation, and with reference to the current annual value.

Sir *James Scarlett* and *Follett* now shewed cause. If the operation of this statute is to give the compensation contended for, it is an injustice to the landlord, who, when about to sell his estate, is, without any reason, deprived of part of the saleable value. The seventeenth section provides an indemnity for the tenant where a tenancy for years or from year to year is determined by the act of the company, because they may put out the party at three months' notice, where the law would not otherwise allow it. The nineteenth section was intended to give compensation where any injury arose from the act of the company, even though they might not determine the tenancy at three months' notice; but this compensation was designed only for a particular class of tenants; for the act says, that all tenants for years, from year to year, or at will, on the *Hungerford House* estate, who shall be injured in respect of any interest for good-will, &c., by the passing of the act, shall have such compensation

sation from the company, by *such and the same means* as are provided for the *tenants of all and singular the hereditaments contained in the first schedule* to the act (a). Now, those are certain leaseholders enumerated by name, of whom the party at present applying is one, and the sale and purchase of whose interests is provided for by the first section of the act: and when this clause enacts, that the persons mentioned in it shall receive compensation for good-will by the same means as are provided in respect of the persons mentioned in the schedule, it distinguishes these last, and recognizes them as a separate class from the tenants who are to have a claim in respect of good-will. It cannot be supposed that the legislature meant to allow such a claim in persons who held leases for fourteen or twenty years, as if they could have a valuable interest in the expectation that such leases would be renewed on the same terms. The evidence in this case shews that in fact the tenant had no ground for such expectation. If Mr. *Wise* had kept the estate, and *Gosling* had sold the residue of his term to a private person, could he have obtained a price for good-will? Not only did his term expire at a stated time, when it

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213. 224. 227.

(a) Section 19. "And be it further enacted, that all or any person or persons, tenant or tenants for years, from year to year, or at will, occupier or occupiers of all or any part of the said old market, market-house, messuages, shops, buildings, wharfs, and other hereditaments forming the said estate called *Hungerford House* or *Hungerford Inn*, or therewith contracted to be purchased by the said company, who shall or may sustain or be put unto any loss, damage, or injury, in respect of any interest whatsoever, for good-will, improvements, tenant's fixtures, or otherwise, which they now enjoy, by reason of the passing of this act, shall and may have and receive all and every such benefit and advantage by way of compensation from the said company, for every such loss, damage, or injury, by such and the same means as are herein enacted and provided for and in respect of the person or persons, tenant or tenants of all and singular the hereditaments in the first schedule to this act contained."

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the improvements and tenant's fixtures. The mention of these in sect. 19. must refer to cases where the tenant has a legal interest in them. Here he has not, for he is bound to yield them up at the end of the term. The only way in which they can be considered as affecting any interest mentioned in the nineteenth section is, that they gave the tenant a better chance of having his lease renewed on favourable terms.] The interest which the party had in the fixtures and improvements would be for the consideration of a jury, who could look into the particulars both of the original holding and of the assignment. This Court has not sufficient information to enable it to do so. And a mandamus must go, at all events; for on the point of good-will there is no distinction between this and former cases.

DENMAN C. J. The rule must be made absolute, and the mandamus will be, to summon a jury to assess compensation for the damage, if any, sustained by this party by reason of the act having passed, in respect of good-will, or the chance of a beneficial renewal of his lease. Whatever difficulties arise under this section are difficulties which the company have brought upon themselves. They have procured an act to be drawn containing a very obscure clause, and it is on condition of carrying that clause into effect that they enjoy the powers with which they are invested as a company. I do not see how the operation of the nineteenth section is to be carried beyond that of the seventeenth, except by the construction which was adopted in *Ex parte Farlow* and *Ex parte Still*. The interest in question is certainly a most imperfect one, but the clause ought to receive a liberal construction.

LITTLE.

LITTLEDALE J. The seventeenth section is not applicable to this case, because it relates to persons who are called upon to quit possession before their terms expire. But the nineteenth seems to have been framed in contemplation of cases where the term and interest have expired; for it provides that all or any “tenant or tenants for years, from year to year, or at will, *occupier or occupiers* of all or any part, &c., who shall or may sustain or be put unto any loss, damage, or injury in respect of any interest whatsoever for good-will, improvements, tenant’s fixtures or otherwise, which they now enjoy, by reason of the passing of this act,” shall have compensation, &c. This section would have been unnecessary if it had applied merely to cases where the tenant was put out before the expiration of his term: it must be taken to extend to those interests in good-will, and the chance of beneficial renewal, or in other respects, which the parties, notwithstanding the expiration of their terms, would still have had if the act had not passed.

PARKE J. I am also of opinion, that this case does not materially differ from *Ex parte Farlow*, but that it is distinguished from *Ex parte Wright* by the circumstance I have already referred to. We must give some meaning to the nineteenth section, and to do so, we must apply it to cases not within the seventeenth. The clause must, according to the general rule, be construed beneficially to the parties to be affected by it, as against those who obtain the act. There is a distinction, however, as to the fixtures and improvements, because it appears that the party here had no legal interest in these; and, I think, the mention of them in the act only applies to cases where there is such interest. The enquiry,

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quiry, therefore, will be as to the compensation in respect of injury sustained “for good-will or otherwise;” the fixtures and improvements will not be a subject of assessment, though the jury may consider how far they added to the chance of a beneficial renewal. They will only form an element in the consideration of that chance.

Rule absolute.

Tuesday,
April 16th.

The APOTHECARIES’ Company *against* COLLINS.

A person authorized to practise as a physician, by diploma from a Scotch University, is not thereby exempted from the penalty imposed by 55 G. 3. c. 194. s. 20., for practising as an apothecary in *England* or *Wales*, without the certificate required by that act.

DEBT for penalties incurred under 55 G. 3. c. 194. s. 20. (a), by practising as an apothecary in *England*, without having obtained a certificate of qualification from the Court of Examiners of the Apothecaries’ Company. At the trial before *Parke J.*, at the last Spring assizes for *Dorsetshire*, a verdict was taken for the plaintiff, subject to the opinion of this Court upon the question, whether or not the defendant, having a diploma from a *Scotch* university, authorising him to practise as a physician, was thereby exempted from the penalties of the above clause.

Saund. N. & W. 89.

Barstow now moved to enter a nonsuit. By the twenty-ninth section of the act (b), the privileges of the *English*

(a) Which enacts, “That if any person (except such as are then actually practising as such) shall, after the said 1st day of *August* 1815, act or practise as an apothecary in any part of *England* or *Wales*, without having obtained such certificate as aforesaid, every person so offending shall, for every such offence, forfeit and pay the sum of 20*l.*”

(b) Section 29. is as follows:—“Provided always, and be it further enacted, that nothing in this act contained shall extend or be construed to extend to lessen, prejudice, or defeat, or in anywise to interfere with
any

English universities and of the College of Physicians are saved, and this extends by implication to a physician having a diploma from a university in *Scotland*. A *Scotch* physician, since the union, has always been considered as entitled to the privileges of an *English* one, though there is no express provision to that effect. In *Smith v. Taylor (a)*, Sir James Mansfield, after referring to the statute 14 & 15 *Hen. 8. c. 5.* (which confirms the charter of the College of Physicians, and enacts, that no person shall practise physic without having been examined by the college and obtained testimonials from them, except he be a graduate of *Oxford* or *Cambridge*), adds, “ Since the union with *Scotland*, it has been considered, though I do not exactly know upon what ground, that a degree conferred by a *Scotch* university is of the same effect as a degree conferred by the universities of *Oxford* or *Cambridge*; though, in looking through the articles of union (*b*), I find nothing upon the subject, except that the four *Scotch* universities shall subsist as before with the same rights. Had the matter been attended to at the union, some express provisions would probably have been made; but although no such

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any of the rights, authorities, privileges, and immunities heretofore vested in and exercised and enjoyed by either of the two Universities of *Oxford* or *Cambridge*, the Royal College of Physicians, the Royal College of Surgeons, or the said Society of Apothecaries, respectively, other than and except such as shall or may have been altered, varied, or amended in and by this act, or of any person or persons practising as an apothecary previously to the 1st day of *August* 1815, but the said Universities, Royal Colleges, and the said society, and all such persons or person shall have, use, exercise, and enjoy all such rights, authorities, privileges, and immunities, save and except as aforesaid, in as full, ample and beneficial a manner, to all intents and purposes, as they might have done before the passing of this act, and in case the same had never been passed.”

(a) 1 *New Rep.* 205.(b) 5 *Ann. c. 8.*

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provision was made, it has been generally understood that, in consequence of the clause alluded to, a diploma granted by one of the *Scotch* universities gives the same right to practise physic as a degree at one of the *English* universities, and dispenses with the necessity of being examined by the College of Physicians, and obtaining letters testimonial from thence." [Denman C. J. How can you get over the express words of the statute?] It is certainly difficult; but if the statute were to be strictly construed, a person in the situation of the defendant (and there are many similarly circumstanced) must leave off acting as an apothecary in this country, until he has served an apprenticeship of five years, according to the fifteenth section of this act.

DENMAN C. J. It is clear that all persons are affected by the twentieth section, except those who are specifically exempted. Even *English* physicians would be included within it, if there were not a special exception in their favour in the twenty-ninth section. If there are many persons interested in this question, that very circumstance is a reason for not granting a rule to shew cause if we think the point perfectly clear.

LITTLEDALE J. The act, which begins by reciting the charter of the Apothecaries' Company, proceeds, in sect. 14., to prohibit any person from practising as an apothecary except upon the conditions there imposed; and these are extended in general terms to all persons except those already in practice as apothecaries. The words would include all persons who have taken medical degrees, were it not for the twenty-ninth section, which saves the rights of "the two universities of *Oxford* and *Cambridge*,"

Cambridge,” and of the other bodies there named. But the act, by expressly exempting the two *English* universities, does not exempt those of *Scotland* also. The statute applies to *England* and *Wales* only: *Scotland* is not in contemplation.

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PARKE J. The words of the act are too plain to be got over. Section 14. contains a general prohibition, to which certain exceptions are made by sect. 29., but that contains no exemption in favour of *Scotland* or *Ireland*: all the provisions on the subject apply to *England* and *Wales*. The duty of an apothecary, as defined by sect. 5., is, “to prepare with exactness, and to dispense, such medicines as may be directed for the sick by any physician lawfully licensed to practise physic by the president and commonalty of the Faculty of Physic in *London* or by either of the two universities of *Oxford* or *Cambridge*.” A *Scotch* physician is certainly not enabled by the act to perform this duty.

Rule refused.

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Tuesday,
April 16th.

DOE dem. WILKS and Others *against*
W. B. RAMSDEN, Clerk.

A rector, after the stat. 13 *Eliz.* c. 20. had been repealed, and before its revival by 57 *G. 3.* c. 99., demised his rectory to a trustee for ninety-nine years, to secure an annuity. After the passing of 57 *G. 3.* c. 99., by deed reciting the grant of the former annuity, and that *A.* had agreed to purchase of the grantor an annuity of 574*l.* a year for 4400*l.* and out of that sum to pay off the former annuity, and that that annuity and the term created to secure the same, should be assigned to a trustee for *A.*'s benefit, the rector granted the said annuity of 574*l.*, chargeable on his rectory; and the trustee of the term created to secure the annuity of 1813, assigned it to a trustee for the benefit of *A.* :

Held, that inasmuch as the term was created after the passing of the 43 *G. 3.* c. 84. which repealed the 13 *Eliz.* c. 20. the assignment of it, though for the purpose of securing the payment of an annuity charged on the benefice after the passing of 57 *G. 3.* c. 99. was valid.

1 Bac. 237.

EJECTMENT to recover the rectory of *Great Stambridge*, in the county of *Essex*. At the trial before Lord *Lyndhurst* C. B., at the Spring assizes for *Essex*, 1833, the following appeared to be the facts of the case:— On the 18th of *February*, 1813, the defendant, the rector of *Great Stambridge*, granted by indenture to *Elizabeth Fisher*, an annuity of 260*l.* per annum for her life, and by the same indenture demised to *Robert Withy* the rectory and glebe lands and tithes thereof, &c. habendum for ninety-nine years, upon trust for better securing the payment of the annuity. By another indenture, dated the 6th of *September* 1816, the defendant granted to *Thomas Henry Shepherd*, during his life, an annuity of 93*l.*, which was also secured by a demise of the rectory to a trustee, for ninety-nine years. In 1820, and in 1823, he granted two other annuities, the first charged on his vicarage of *Little Wakering* and the second charged on the rectory of *Great Stambridge* and vicarage of *Wakering*; and demised those two benefices for terms of years to trustees, for the purpose of securing those annuities. By indenture of the 19th of *January* 1825, reciting the grants of annuities above mentioned, and that the defendant had

agreed

agreed to pay off and repurchase those annuities, and that *Peter Moore*, the chairman of the *British Annuity Company*, had on behalf of the company agreed with the defendant for the purchase of an annuity of 574*l.* for a term of ninety years, if the defendant should so long live, for the price of 4400*l.*, and that it had been agreed that *Moore* should out of that sum pay off the several annuities before granted, and that the annuities, and the terms created to secure the same respectively, should be assigned to a trustee for the benefit of the company, the defendant granted an annuity of 574*l.*, payable quarterly on certain specified days, and charged on his rectory and vicarage, to *Moore*; and there was a power of distress in case it should be in arrear for twenty-one days, and a power to enter and take the rents, tithes, and profits, if it should be in arrear for twenty-eight days. The indenture also contained an assignment of the four annuities by the annuitants; of the two terms created in 1813 and 1816, by *R. Withy* and *J. H. Shepherd*; and of the two other terms created in 1820 and 1823, by the trustees of those terms, respectively, to *Wilks*, as a trustee, for the benefit of the company. In 1826 the annuity became in arrear, and a sequestration issued. It was contended for the defendant that the deed of 1825 created a new charge on the defendant's living, and the assignment of the former terms to a trustee for the purpose of securing the payment of an annuity so created since the statute 57 G. 3. c. 99., was void. Lord *Lyndhurst* was of opinion, that the assignment to *Wilks* of the terms created in 1813 and 1816, vested the legal estate in him, and therefore that the lessor of the plaintiff was entitled to recover;

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and he directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit.

Comyn now moved accordingly. The assignment of the terms granted in 1813 and 1816, to *Wilks*, did not vest the legal estate in him, because the object of it was to secure, not the original annuities, but the annuity first granted by the deed of 1825. It operated, therefore, as a new charge on an ecclesiastical benefice, and consequently is void. The terms created to secure the annuities granted in 1813 and 1816, have been satisfied by the payment of those annuities. [*Parke J.* The two terms created in 1813 and 1816 for the purpose of securing the annuity, and charged on the benefice, were valid in point of law, because the charge created by them was made after the passing of 43 G. 3. c. 84., and before the passing of 57 G. 3. c. 99. The assignment of those terms for the purpose of securing the annuity granted in 1825, operated pro tanto as a continuance of the original charge, and vested the legal estate in the lessor of the plaintiffs. This case is precisely the same as *Doe v. Gully (a)*.]

Per Curiam. There must be no rule.

Rule refused.

(a) 9 B. & C. 344.

1833.

BARON *against* HUSBAND.Tuesday,
April 16th.

ASSUMPSIT for money had and received, &c. Plea, general issue. At the trial before *Parke J.*, at the last assizes for the county of *Devon*, it appeared that, in 1817, the plaintiff sued out a commission of bankrupt against one *Birdwood*. The plaintiff was both petitioning creditor and solicitor. His costs, previous to the choice of assignees, being 194*l.* 16*s.* 7*d.*, the assignees paid him, at different times, 90*l.* on account, leaving a balance due to him of 104*l.* 16*s.* 7*d.* After a lapse of fourteen years, the surviving assignees appointed the defendant their solicitor; and, on the 17th of *June* 1831, an audit having been appointed, they were proceeding to pass their accounts, taking credit for the balance due to the plaintiff. The commissioners required an order to be given for the payment before they would complete the audit; whereupon the defendant received a cheque from the assignees for 104*l.* 16*s.* 7*d.*, for the purpose of settling the plaintiff's account, and undertook to do so. He thereupon immediately saw the plaintiff, and offered to pay him the money, provided he would give a receipt with an agreement that the costs should be subject to further taxation. This the plaintiff refused to do. It appeared that some fees, due to one of the commissioners, were included in the 104*l.* 16*s.* 7*d.*; and that subsequently to the above interview, the defendant paid them to the commissioner, under the authority of an order from the plaintiff. There was no proof that the commissioners had ascertained the amount of costs, according to 5 *G.* 2. *c.* 30. *s.* 25., and 6 *G.* 4. *c.* 16. *s.* 14.

The solicitor to the assignees of a bankrupt, received from them a sum of money, to be applied in payment of the costs of the petitioning creditor up to the time of the choice of assignees. The solicitor offered to pay the money, on condition that the bill should undergo a subsequent taxation, but to that the petitioning creditor would not assent: Held, that the latter could not maintain money had and received thereupon against the solicitor, though after the above offer and refusal, he had authorised the solicitor to pay over part of the money in discharge of commissioners' fees.

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The learned Judge, being of opinion that this was necessary, nonsuited the plaintiff.

Coleridge Serjt. now moved to set aside the nonsuit. The 5 G. 2. c. 30. (which was the bankrupt act in force in 1817), by s. 25., requires the petitioning creditor to prosecute the commission at his own costs until assignees shall be chosen; and the commissioners, at the meeting appointed for the choice of assignees, are to ascertain such costs, and, by writing under their hands, to order the assignees to repay the petitioning creditor his costs out of the first money or effects that shall be collected by them under the commission. And even assuming that the omission to have the amount of costs ascertained by the commissioners according to the present act, might be an answer to an action brought by the solicitor against the petitioning creditor, it is not an answer to this action, which is brought by the plaintiff for money received for his use by the defendant. [*Parke* J. I doubt whether money had and received be maintainable here, because there is no privity between the plaintiff and defendant. The proof is, that the defendant offered to pay the plaintiff the amount of the check, on a condition which the latter refused to comply with. It does not appear that there was any previous agreement between them, that the defendant should receive the money from the assignees for the plaintiff's use. If I give a sum of money to my servant to pay a tradesman, the latter cannot maintain an action for money had and received against the servant.] Here it must be taken that the defendant received the money with the sanction of the commissioners; he received it expressly for the use of the plaintiff; the audit could not have proceeded, except on the footing of the

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the plaintiff's bill having been paid by the assignees, by the payment made to the defendant. The subsequent disposition of a part of this money, pursuant to the directions of the plaintiff, shews that the defendant was continuing to hold it as the plaintiff's money; and having received it for the plaintiff, and held it for him, it is not open to him now to repudiate the character of agent to the plaintiff, or to deny the privity between them.

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Cur. adv. vult.

DENMAN C. J. in the course of the term delivered the judgment of the Court.

In this case a motion was made by my brother *Cole-ridge* for a rule nisi to set aside a nonsuit in a cause tried before my brother *Parke*, at *Exeter*. It was an action for money had and received, brought by the petitioning creditor against the solicitor to the assignees, who appeared to have received a check from them for the amount of the plaintiff's bill up to the choice of assignees, but who had declined to pay the plaintiff's demand. It may be taken that the defendant had received cash for the cheque. The nonsuit proceeded on the ground that the plaintiff had no right to sue for the amount, until his bill had been taxed under 6 G. 4. c. 16. s. 14.; and it was contended that the learned Judge was wrong in this respect, and that taxation of the bill was not requisite if the assignees chose to waive it. It is not necessary for us to pronounce any opinion upon this question; because admitting that the bill need not have been taxed, we are of opinion that this action will not lie, for want of privity between the plaintiff and defendant.

The defendant received the money as the agent of

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the assignees and not of the plaintiff; he held it subject to their control and directions, and would continue to be accountable to them, until he entered into some binding engagement with the plaintiff to hold it for his use. As soon as that engagement was entered into, and not until then, he would hold the money for the plaintiff's use. This is the doctrine laid down in *Williams v. Everett (a)*, *Wharton v. Walker (b)*, *Scott v. Porcher (c)*, *Wedlake v. Hurley (d)*, and has been acted upon in many other cases.

In this case there has been no such engagement. The defendant never promised to pay the plaintiff, except upon a condition to which he would not assent, namely, that his bill should undergo a subsequent taxation; and his part payment, by the direction of the plaintiff, of the commissioner's fees, cannot operate except as part payment. For these reasons we are of opinion that the nonsuit was right; and, therefore, refuse a rule.

Rule refused.

(a) 14 *East*, 582.

(b) 4 *B. & C.* 163. 6 *Dow. & Ry.* 288.

(c) 3 *Mer.* 652.

(d) 1 *Cro. & Jervis*, 85.

Wednesday,
April 17th.

WILSON *against* BARKER and MITCHELL.

A person who knowingly receives from another a chattel which the latter has wrongfully seized, and afterwards, on demand, refuses to give it back to the owner, does not thereby become a joint trespasser, unless the chattel was seized for his use.

TRESPASS for assaulting the plaintiff, and taking a gun from him. At the trial before *Alderson J.*, at the last Spring assizes at *York*, the following facts were proved:—The plaintiff was shooting on *Meltham Moors* in the West Riding of *Yorkshire*, when the defendant, *Mitchell*, seized him and took away his gun. The taking

Samuel M. V. 675.

was

was wrongful. *Mitchell* was the servant of a Mr. *Peace*, to whom the game on these moors was given by certain parties, entitled as holders of allotments under an inclosure act. The other defendant, *Barker*, was employed by Mr. *Peace* in protecting the game. *Mitchell* took the gun to *Barker*, who, on being subsequently asked for it by the plaintiff, refused to give it up. An endeavour was made, but without success, to shew that *Barker* admitted having authorized *Mitchell* to seize it. *Alderson J.* was of opinion, that this evidence did not support an action of trespass against *Barker*, and that, to reach both parties, the form of action should have been trover. A verdict was therefore taken, under the learned Judge's direction, for *Barker*, and against *Mitchell* with 40s. damages.

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Alexander now moved for a rule to shew cause why a new trial should not be had, on the ground of misdirection. Assuming that *Mitchell* did not act as *Barker's* servant in seizing the gun, yet *Barker* ratified the act by his subsequent conduct, and thereby made himself liable as a trespasser. In *Badkin v. Powell (a)*, Lord *Mansfield* says, that a pound-keeper is not liable in trespass for merely taking in cattle brought to the pound by other persons, who act at their own peril if the taking has been wrongful: but "if he goes one jot beyond his duty and assents to the trespass, that may be a different case." In *Aaron v. Alexander (b)*, where a wrong person was apprehended under a warrant and carried to the watch-house, the watch-house keeper, who received and detained him, was held liable in trespass, though he had had no means of ascertaining the identity

(a) *Cowp.* 478.(b) 3 *Camp.* 35.

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of the party. [*Littledale J.* There the detention was a fresh trespass.] In *Hull v. Pickersgill and Others (a)*, the defendants (in trespass) were creditors who had seized the goods of an uncertificated bankrupt for debts incurred after the bankruptcy; but it appeared that the assignees had afterwards surrendered to the defendants all their interest in these goods under the commission, and this was held to be a ratification of the seizure as made to the use of the assignees. [*Parke J.* Lord Coke, in 4 *Inst.* 317., states, as a difference between the forest law and the common law, that, by the former, whosoever receives within the forest any malefactor in hunting or killing the king's deer, knowing him to be such malefactor, or any flesh of the king's venison, knowing it to be the king's, is a principal trespasser; whereas by the common law, "he that receiveth a trespasser and agreeth to a trespass after it be done is no trespasser, unless the trespass was done to his use, or for his benefit, and then his agreement subsequent amounteth to a commandment, for in that case *omnis ratihabitio retrotrahitur et mandato æquiparatur*; but, by the law of the forest, such a receiver is a principal trespasser, though the trespass was not done to his use." Unless you could prove here that the seizure of the gun was to *Barker's* use, he cannot be made liable in trespass.]

Per Curiam (b). The direction was right; there must be no rule.

Rule refused.

(a) 1 B. & B. 282.

(b) *Littledale, Parke, and Patteson Js.* Denman C. J. had left the Court.

1833.

DOE dem. CAWTHORN *against* MEE.Wednesday,
April 17th.

AT the trial of this cause before *Bosanquet J.* at the last *Northampton* assizes, the plaintiff, in order to prove a surrender of a copyhold tenement, made out of court, and the subsequent presentment of such surrender, according to the custom of the manor, and the admittance of the new tenant, produced copies of the entries of these proceedings on the court rolls, examined and stamped. *Miller*, for the defendant, objected that such copies, assuming that they would have been evidence if the surrender had been made in court, were not so where the surrender was out of court. *Bosanquet J.* received the evidence, and the plaintiff had a verdict.

Miller, by leave reserved, now moved to enter a nonsuit on account of the reception of the above evidence, to which he renewed his former objection. The original surrender at least should have been produced at the trial. In 2 *Watkins on Copyholds*, 4th ed. p. 38, note 1 (by the editor), it is stated that "copies of court roll are but secondary evidence of the copyholder's title," and that "in ejectment the rolls themselves must be produced." [*Littledale J.* There would be great inconvenience in requiring the production of the original rolls. *Patteson J.* Is there any authority for such a proposition? The contrary is stated in *Buller's Nisi Prius* (a).]

The stamp act, 48 G. 3. c. 149. (s. 32.) requires every lord of a manor taking a surrender or granting admittance,

The 48 G. 3. 12 Geo 3. c. 149. s. 32. which requires that every surrender of copyhold, and admittance, &c. made out of court, or a memorandum thereof, shall be stamped; and sect. 33. which enacts, that in cases of surrender, &c. in court, the steward shall make, and deliver to the tenant, a stamped copy of the court roll, are merely revenue regulations, and not intended to vary the rules of evidence; and, therefore, a surrender and admittance out of court, (presented and enrolled afterwards) may be proved by an examined copy of the court roll, without producing the original surrender, &c. or memorandum thereof.

2 *Watk Cop.* 38.
2 *Phil Ev.* 240.

(a) 247 a. 7th ed.

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out of court, to cause *the same or a memorandum thereof* to be put in writing on stamped paper, &c.; and by section 33., in cases of surrender and admittance in court, the steward is to make *a copy* of the court roll of such surrender and admittance, on a stamp, and deliver the same to the party entitled, under a penalty of 50*l*. In the latter case the act requires a stamped copy of the roll to be given, and such copy may, therefore, be evidence; but in the case of a surrender out of court, the original only need be stamped, and if the surrender could be proved without production of the original, a title might be established without shewing any stamped document, and so the revenue might be defrauded. *Doe lessee of Bennington v. Hall* (a) was cited for the defendant at the trial, but that only shews that the original entry on the court roll is evidence notwithstanding the statute.

LITTLEDALE J. I think the statute makes no difference as to the admissibility of this evidence. The object of the clauses which have been cited was, to establish a mode of getting at the payment of revenue in the case of transfers of copyhold, since it was not practicable to regulate the ad valorem duty on conveyances of this, in the same way as of other kinds of property; but there was no intention to vary the rules of evidence. There is no doubt that copies of the court rolls are admissible in all cases.

PARKE and PATTESON Js. concurred.

Rule refused.

(a) 16 *East*, 208.

1833.

BOLTON, Administrator of TIMOTHY BOLTON,
against DUGDALE, Executrix of ABRAM DUG-
DALE.

Thursday,
April 18th.

ASSUMPSIT for money lent, &c. Pleas, the general issue, and statute of limitations. At the trial before *Alderson J.* at the last assizes for the county of *York*, the following instrument was given in evidence to prove the loan of the money by the intestate to the testator.

“Received and borrowed of *Timothy Bolton*, labourer, the sum of 30*l.* which I do hereby promise to pay with interest at the rate of 5 per cent. I also promise to pay the demands of the sick club at *Haworth* in the county of *York*, in part of interest, and the remaining stock and interest to be paid on demand to the said *Timothy Bolton*, his executors, administrators, or assigns. Witness my hand this 17th day of *September*, 1805. *Abram Dugdale.*”

The instrument bore a 1*l.* agreement stamp, and on the back of it was a receipt for the penalty of 5*l.*, and 1*l.* duty. *Bolton* the intestate lived at *Blackburn* in *Lancashire*, and was a member of a sick club at *Haworth*, near which place *Dugdale* the testator lived. *Dugdale* had within six years paid money to the club on *Bolton's* account. For the defendant it was contended that the instrument was a promissory note, and, therefore, could not be received in evidence, the stamp having been affixed after it was made; to which point *Green v. Davies (a)* was cited. The learned Judge thought the

“Received and borrowed of *A. B.* 30*l.*, which I promise to pay with interest, at the rate of 5 per cent. I also promise to pay the demands of the sick club at *H.* in part of interest, and the remaining stock and interest to be paid on demand to the said *A. B.* Witness my hand, &c. *C. D.*”

This is not a promissory note.

Sumd P. & W. 740.
102 & L. 102

(a) 4 B. & C. 235.

writing

1893.

BOLTON
against
DUGDALE.

writing was an agreement; and he directed a verdict for the plaintiff, giving leave to move to enter a nonsuit.

Knowles now moved accordingly. No specific form of words is necessary to constitute a promissory note. Here, if the document had ended with the first sentence, it would have nearly resembled that which was held to be a promissory note in *Green v. Davies (a)*. Then was its character altered by the subsequent promise to pay the demands of the sick club in part of interest? The mention of the club was only a description of the mode in which those payments were to be made; as if at the foot of a common promissory note there had been a memorandum that the interest was to be paid into a particular bank. [*Parke J.* Could *Dugdale* have been obliged to pay the interest in any other way than to the sick club? And it was uncertain what their demands would be.] He was liable to pay *Bolton* on demand, and it is not clear that that demand might not have been made before any thing was due to the club. The payments to be required by the club could not exceed five per cent. on the principal.

DENMAN C. J. To a certain extent this instrument resembled a promissory note; but it was, in fact, an agreement engrafted on a note. The objection cannot prevail.

LITTLEDALE J. concurred.

PARKE J. The amount of the sick club charges was uncertain; so, therefore, was the sum to be paid to

(a) 4 B. & C. 235.

Dugdale;

Dugdale; the instrument, as far as regarded this contingent demand, could not be a promissory note; and the transaction was entire.

1833.

—
BOLTON
against
DUGDALE.

PATTESON J. The instrument engages for the payment of "remaining stock and interest" at a time not fixed. It is something like the undertaking in *Leeds v. Lancashire (a)*, which was held not to be a promissory note.

Rule refused.

(a) 2 Camp. 205.

MARY ANN WILLIAMS *against* WILLIAM
CARWARDINE.

Thursday,
April 18th.

ASSUMPSIT to recover 20*l.*, which the defendant promised to pay to any person who should give such information as might lead to a discovery of the murder of *Walter Carwardine*. Plea, general issue. At the trial before *Park J.*, at the last Spring assizes for the county of *Hereford*, the following appeared to be the facts of the case:—One *Walter Carwardine*, the brother of the defendant, was seen on the evening of the 24th of *March* 1831, at a public-house at *Hereford*, and was not heard of again till his body was found on the 12th of *April* in the river *Wye*, about two miles from the city. An inquest was held on the body on the 13th of *April* and the following days till the 19th; and it appearing that the plaintiff was at a house with the deceased on the night he was supposed to have been murdered, she was examined before the magistrates, but did not then give

A. by public advertisement stated, that whoever would give information which should lead to the discovery of the murder of *B.* should, on conviction, receive a reward of 20*l.*: Held, that *C.*, who gave such information, was entitled to recover the 20*l.*, though she was led to inform, not by the proffered reward, but by other motives.

Said Pl. & Co. 1025.

1833.

WILLIAMS
against
CARWARDINE.

give any information which led to the apprehension of the real offender. On the 25th of *April* the defendant caused a hand-bill to be published, stating that whoever would give such information as should lead to a discovery of the murder of *Walter Carwardine* should, on conviction, receive a reward of 20*l.*; and any person concerned therein, or privy thereto, (except the party who actually committed the offence) should be entitled to such reward, and every exertion used to procure a pardon; and it then added, that information was to be given, and application for the above reward was to be made to Mr. *William Carwardine, Holmer, near Hereford*. Two persons were tried for the murder at the Summer assizes 1831, but acquitted. Soon after this, the plaintiff was severely beaten and bruised by one *Williams*; and on the 23d of *August* 1831, believing she had not long to live, and to ease her conscience, she made a voluntary statement, containing information which led to the subsequent conviction of *Williams*. Upon this evidence it was contended, that as the plaintiff was not induced by the reward promised by the defendant, to give evidence, the law would not imply a contract by the defendant to pay her the 20*l.* The learned Judge was of opinion, that the plaintiff, having given the information which led to the conviction of the murderer, had performed the condition on which the 20*l.* was to become payable, and was therefore entitled to recover it; and he directed the jury to find a verdict for the plaintiff, but desired them to find specially whether she was induced to give the information by the offer of the promised reward. The jury found that she was not induced by the offer of the reward, but by other motives.

Curwood

Curwood now moved for a new trial. There was no promise to pay the plaintiff the sum of 20*l*. That promise could only be enforced in favour of persons who should have been induced to make disclosures by the promise of reward. Here the jury have found that the plaintiff was induced by other motives to give the information. They have, therefore, negatived any contract on the part of the defendant with the plaintiff.

1833.
—
WILLIAMS
against
CARWARDINE.

DENMAN C. J. The plaintiff, by having given information which led to the conviction of the murderer of *Walter Carwardine*, has brought herself within the terms of the advertisement, and therefore is entitled to recover.

LITTLEDALE J. The advertisement amounts to a general promise, to give a sum of money to any person who shall give information which might lead to the discovery of the offender. The plaintiff gave that information.

PARKE J. There was a contract with any person who performed the condition mentioned in the advertisement.

PATTESON J. I am of the same opinion. We cannot go into the plaintiff's motives.

Rule refused.

1833.

Thursday,
April 18th.

HINE *against* ALLEY and Another.

In assumpsit on a bill of exchange drawn upon "P. P., No. 6. Budge Row," and accepted by him, an averment that the bill, when due, was presented and shewn to P. P. for payment, is supported by proof that the holder went to 6. Budge Row, to present it, but found the house shut up, and no one there. And notice may be given to the drawers on the day of such dishonour, as in the case of an actual refusal to pay.

Samd N. V. 1 v. 265.

ASSUMPSIT by indorsee against drawers of a bill of exchange, dated 15th *May* 1830, payable to themselves, at three months, directed to "Mr. *Peter Perry*, No. 6. *Budge Row*, *Watling Street*," and accepted by him. Averment, that on the 18th of *August*, 1830, the said bill was presented and shewn to the said *Peter Perry* for payment; and he then and there had notice of the indorsement, &c., and was requested to pay, but would not, of which the defendants had notice. Plea, the general issue. At the trial before *Parke J.* at the sittings in *Middlesex*, after last *Hilary* term, it appeared that on the day the bill became due, it was taken to No. 6. *Budge Row*, to be presented on behalf of the plaintiff, but the house was shut up, and no further presentment could be made. On the same day the bill was shewn to the defendants, and notice given them of the dishonour. No other notice appeared to have been given within proper time. It was objected, upon this evidence, that the averment in the declaration, that the bill was *presented and shewn* to *Perry*, was not made out, though if the declaration had said "duly presented" only, the proof might have been sufficient. *Parke J.* thought there was a presentment, and that the rest of the averment might be rejected as surplusage. It was further objected that the only notice proved was given to the drawers on the day the bill became due: whereas the whole of that day ought to have been allowed them for payment. *Parke J.* overruled this objection also, and a verdict was found for the plaintiff, but leave given to enter a nonsuit.

Erle

Erle now moved accordingly, and re-stated the objections. [*Parke J.* As to the first, *Hardy v. Woodrooffe* (a) is in point.] At all events the notice on the 18th was premature. *Burbridge v. Manners* (b) may be cited in answer, but there Lord *Ellenborough* said, "I think the note was dishonoured as soon as the maker had *refused payment* on the day when it became due." Here the holder only concluded that the bill would not be paid, from finding no one at the house. There had been no refusal.

1833.

 HINE
against
ALLELY.

Per Curiam (c). It is the same, if the house is shut up and no one there. Both cases are in point.

Rule refused.

(a) 2 *Stark.* 319.(b) 3 *Camp.* 193.(c) *Denman C. J., Littledale, Parke, and Patteson Js.*

The APOTHECARIES' Company *against* ALLEN.

 Thursday,
April 18th.

DEBT for penalties under 55 G. 3. c. 194. s. 20., for acting and practising as an apothecary in *England*, to wit, at *Grantham*, by then and there, as such apothecary, attending and advising, and furnishing and supplying medicines to and for the use of *R. R.*, without having obtained a certificate pursuant to the act; it being also averred, that defendant was not practising as an apothecary on or before the 1st of *August* 1815. Plea, the general issue. At the trial before *Denman C. J.*, at the *Lincoln* Spring assizes 1833, it appeared that the defendant had not been in regular practice as an apothecary on or before the 1st of *Aug.* 1815, and had not a certificate;

A person who advises patients, and compounds and sells the medicines recommended by himself, but does not and cannot make up physicians' prescriptions, is liable to the penalties of 55 G. 3. c. 194. s. 20., for practising as an apothecary without a certificate.

Said Pl & Co. 87.

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S s

that

1833.

The
APOTHECARIES'
Company
against
ALLEN.

that he kept no shop, but lived in lodgings; that he did not make up physicians' prescriptions, and was not able to do so, but that he advised patients, and made up and sold to them the medicines which he himself ordered. *Denman* C. J. was of opinion, that a person compounding medicines, and selling them under these circumstances, did act as an apothecary in the ordinary sense of the term, and that it made no difference if he prescribed, as well as prepared, the medicine. The jury, under his direction, found a verdict for the plaintiff.

Balguy now moved for a new trial, on the ground of misdirection. It is not a practising within the act, where the party merely prepares and dispenses medicines recommended by himself, and does not make up physicians' prescriptions. In *The Apothecaries' Company v. Warburton* (a) it was held, that a person could not come within the protection of the act, as having practised before the 1st of *August* 1815, if he was then incapable of preparing medicines from a prescription. If a person so disqualified could not practise for the purpose of acquiring the privileges of the act, neither ought he to be considered as practising so as to incur its penalties. It was not the design of the legislature to guard against such cases as this; they might be left to the common sense of mankind. In section 5., the duty of an apothecary is stated to be "to prepare with exactness, and to dispense, such medicines as may be directed for the sick by any physician lawfully licensed," &c. And the penalty imposed by that clause is for not observing the directions to be given by *such prescription*. [*Parke* J.

(a) 3 B. & A. 40.

According

According to your argument, any person, however ignorant, might safely dispense any quantity of medicine.] Provided he did not practise as an apothecary within the terms of the act. In the extreme case suggested, if people are willing to trust such a person, they are not within the protection which the legislature intended to give.

1833.

The
APOTHECARIES'
Company
against
ALLEN.

DENMAN C. J. It is true the Court held in *The Apothecaries' Company v. Warburton* (a) that a man who before August 1815 had administered medicines without being able to make up a physician's prescription, had not practised so as to be within the protection of 55 G. 3. c. 194. s. 20.; but it does not follow that a person so disqualified is free from the penalty there imposed.

LITTLEDALE J. I do not know what is acting or practising as an apothecary within the clause in question, if this is not.

PARKE J. The preamble to section 5. does not profess to recite all the duties of an apothecary, but only those referred to by the penal enactments which follow. It is not to be inferred from the decision in *The Apothecaries' Company v. Warburton* (a), that if a person compounds medicine without being able to make up a physician's prescription, he is not liable to penalties for practising as an apothecary.

PATTESON J. concurred.

Rule refused.

(a) 3 B. & A. 40.

1833.

Friday,
April 19th.The KING *against* The Inhabitants of HENDON.

71
A parish may be indicted for non-repair of a bridge, without stating any other ground of liability than immemorial usage.

INDICTMENT stated that there is a certain common public bridge called *Decoy Bridge*, situate in the parish of *Hendon*, in the county of *Middlesex*, in the king's common highway there, for all his *Majesty's* subjects to go, return, &c. on foot, and with horses, and carriages, &c.; and that *the inhabitants of the said parish, from time whereof, &c. have repaired and amended, and been used and accustomed, &c. and of right ought to have repaired and amended, and still of right ought, &c. the said bridge when and so often as it hath been or shall be necessary; and that the said bridge on, &c., and from thence hitherto was out of repair. Plea, not guilty. At the sittings in Middlesex after last Hilary term the defendants were convicted, and now*

Talfourd Serjt. moved in arrest of judgment. A parish is not chargeable of common right with the repair of a bridge, and therefore an indictment against them for non-repair ought to shew some consideration for such duty being imposed upon them, and not merely to state immemorial usage. In the *Glusburne Beck* case (*Rex v. The Inhabitants of the West Riding(a)*), it is laid down that "the inhabitants of the county are of common right bound to repair all public bridges, because they are for the benefit of the county;" and that "if a man builds a bridge, and it becomes useful to the county in general, the county shall repair it." It is

(a) 5 Burr. 2594.

difficult

difficult to say how such a body as a parish could originally incur this liability (*a*); it could not be *ratione tenuræ*, and they are not a corporation for the purpose of taking tolls. In *Rex v. Oswestry* (*b*) a hundred was charged in the form here used, but that case was considered chiefly with reference to another objection: and hundreds and ridings are integral parts of a county: parishes are not: a parish is often in two counties. [*Parke J.* The statute 22 *Hen. 8. c. 5.*, for the repair of bridges, recites in sect. 2. that, “in many parts of this realm it cannot be known and proved what hundred, riding, wapentake, city, borough, town, or *parish*, nor what person certain or body politick ought of right to make such bridges decayed;” and enacts by sect. 3. that in such cases, the bridges shall be made by the inhabitants of the shire or riding. This recognizes a parish as a district which might be liable at common law to repair bridges. And it would be very difficult to distinguish this case from that of a township charged with the repair of a highway, where the liability is constantly stated as established by prescription.

1833.

The King
against
The Inhabit-
ants of
Hendon.

DENMAN C. J. There is no ground for a rule.

Rule refused (*c*).

(*a*) See *Rex v. The Justices of Buckingham*, 8 *B. & C.* 375.

(*b*) 6 *M. & S.* 361.

(*c*) See *Rex v. Ecclesfield*, 1 *B. & A.* 348., Lord *Ellenborough* there, referring to the statute of bridges and to *Magna Charta*, cap. 15., says: “From both which statutes it appears that towns, or districts smaller than a county, had been accustomed in some cases to make bridges; and so in fact they continue to do until this day. And upon the whole it seems manifest, that the extent of the territory chargeable in this case is to be ascertained by usage and custom, and that in default only of an usage and custom to charge a smaller territory, the charge shall fall upon the larger, that is, upon the county.” P. 359. And he draws an analogy from the liability of a parish to repair a bridge, to that of a township to repair a road, by usage.

1833.

Friday,
April 19th.TOMLINSON, Gent. one, &c. *against* BRITTLEBANK,
Gent. one, &c.

The words,
"He robbed
J. W." are
actionable, as
imputing an
offence punish-
able by law.
If they were
used in any
other sense,
the defendant
must shew it.

Per Den-
man C. J.,
and Parks J. ;
Littledale J.
dubitante.

y Bac. 262.

10 Bing. 402.

4 M. & W. 205
1. T. & E. 588

CASE for words. The declaration contained several counts for words reflecting on the plaintiff as an attorney, but the last count merely stated, that in a certain discourse which the defendant had of and concerning the plaintiff in the presence, &c., he, the defendant, contriving and intending to injure the plaintiff in his good name, fame, and credit, falsely and maliciously spoke and published of and concerning him, the false, scandalous, malicious, and defamatory words following: viz. "*He robbed John White* ; thereby meaning that the said plaintiff had been and was guilty of an offence punishable by law." No special damage was laid, applicable to this count. Plea, the general issue. At the trial of this cause at the last assizes for *Stafford*, a verdict was taken for the plaintiff upon the whole declaration.

R. V. Richards now moved for a rule to shew cause why the judgment should not be arrested. The words in this count are not actionable without special damage. It is true that in 7 & 8 G. 4. c. 29. s. 6. (a), the word "rob" is used to signify the commission of a felony; but the word is of equivocal import, like "forsworn," which by itself is not an actionable expression. There is nothing here to connect the word "rob" with any

(a) It enacts, "that if any person shall rob any other person of any chattel, money, or valuable security, every such offender, being convicted thereof, shall suffer death as a felon."

trans-

transaction to which the statute applies: it is not said that the plaintiff robbed *White* of any chattel or specific thing. In *Com. Dig., Action on the Case for Defamation*, (D) 16., robbery is mentioned as a word of slander, but the instance given is, where it was spoken of a clergyman in his profession, "yonder is Dr. *A.* robbing the church." In *Com. Dig.*, under the same title, (F) 2. it is laid down that to say of a man "he poisoned *A.*," without averring that *A.* is dead, is not sufficiently certain to be actionable (*semble*), and in (F) 4. some equally strong cases are put with respect to stealing. [*Parke J.* The cases under that head in *Com. Dig.*, as to taking words in mitiori sensu, have been very much criticised, as going into too great minuteness (*a*). The reason assigned is, that when those cases occurred, vexatious actions for words were too frequent, and the courts resorted to subtleties to get rid of them (*b*). When it is said that a man robbed another, does not it imply that he took something from him?] There ought at least to be some explanation by the context, to give words the unfavourable sense here contended for. [*Parke J.* That is where the sense to be assigned is not the ordinary one.] It is for the plaintiff to establish the sense which he relies upon. An innuendo cannot enlarge it. In *Holt v. Scholefield* (*c*), where the words were, "*T. H.* has forsworn himself," an innuendo was added, "meaning that the plaintiff had committed wilful and corrupt perjury;" but the count was held not maintainable. If the present count is good, that also might have been supported.

1833.

 TOMLINSON
 against
 BRITTLEBANK.

(*a*) An instance cited, (F. 2., *ibid.*), of words not laid with sufficient certainty, is, "*He cleaved his head; one part lay on one shoulder, another part on the other; without saying that he was dead.*" 2 Cro. 184."

(*b*) See *Button v. Heyward*, 8 Mod. 24.

(*c*) 6 T. R. 691

1833.

—
TOMLINSON
against
BRITTELEMAN.

DENMAN C. J. Almost any words may be used in more than one sense. But the word to “rob” gives a sufficient description of an offence punishable by law in the very terms of the statute 7 & 8 G. 4. c. 29. It has but one legal sense. “Forsworn” is applicable, not only to perjuries punishable at law, but also to offences of the same description which incur no temporal punishment. I think, therefore, that the count is sufficient.

LITTLEDALE J. I do not think the term “to rob” necessarily means taking goods from another by force in the sense of the statute, and I very much doubt whether the count is good; but, as my brothers are of a different opinion, there will be no rule.

PARKE J. I think the *primâ facie* import of the words is, that the plaintiff has done that which in ordinary parlance is called robbing, and is described in this count as a punishable offence. If they were used in any other sense, it was for the defendant to shew it.

Rule refused.

1833.

WOODBIDGE and Others, Assignees of PARKER,
and AGER and Others, Assignees of ELLIS,
against SWANN and Others.

Friday,
April 19th.

ASSUMPSIT for money had and received. Plea,
general issue. At the trial before *Denman* C. J., at
the *London* sittings after last term, the following facts
appeared: — The action was brought by the assignees of
Parker and the assignees of *Ellis*, jointly, to recover two
sums of 900*l.* each, which were paid after the bankruptcy
of *Ellis* to the defendants, who were bankers at *York*.
Ellis and *Parker* were in partnership. *Ellis* became a
bankrupt in *March* 1827; and after his bankruptcy
Parker continued to carry on the joint trade, thinking
the firm solvent. He paid into the bank of the defend-
ants, after the bankruptcy of *Ellis*, 900*l.*, part of the
partnership funds, to be applied by the defendants to pay
running bills of *Parker* and *Ellis*, which were payable at
the bank; and the 900*l.* was applied accordingly. This
was the first sum of 900*l.* sought to be recovered in this
action. After some time, the assignees of *Ellis* joined
with *Parker* in opening a fresh account with the bank.
Parker was desirous of applying the money which was
paid in on this account, to discharge the debt due from
the firm on the old account to the bank, and which was
carrying interest; and he obtained the consent of *Ellis*'s
assignees to the transfer of the sum of 900*l.* only, their
solicitor thinking that that sum would place the defend-
ants in the same situation as the other creditors of the
firm. The sum of 900*l.* was placed to the credit of the
defendants, and formed the second sum sought to be
recovered

After the bank-
ruptcy of one
of two partners,
the solvent
partner, think-
ing the firm
capable of pay-
ing its debts,
continued the
business, and
paid partner-
ship money
into a banker's,
to be applied
in discharge
of running
bills of the
firm, payable at
the bank; and
it was so ap-
plied: Held,
that this pay-
ment, having
been made
bonâ fide, and
without any
contemplation
of bankruptcy
by the solvent
partner, was
valid at law.

The as-
signees and the
solvent partner
afterwards
opened a fresh
account at the
bank, and paid
in 900*l.* to dis-
charge a debt
on the old ac-
count, which
carried interest.
The second
partner then
became bank-
rupt: Held,
that the as-
signees of the
two could not
recover this
last sum.

13 ac. 678.
3.4 gr. 564.

1833.

WOODBRIDGE
against
SWANN.

recovered in this action. *Parker* became bankrupt in 1829; and his assignees joined with those of *Ellis* in suing the bankers for both sums. The Lord Chief Justice was of opinion that they were not entitled to recover either; and he directed the jury to find a verdict for the defendants, but reserved liberty to the plaintiffs to move to enter a verdict for those sums or either of them.

Sir *James Scarlett* now moved accordingly. The plaintiffs are entitled to recover the first sum of 900*l.*, because the solvent partner had no authority to dispose of the partnership funds after the bankruptcy of his co-partner. The effect of the bankruptcy of one partner is to put an end to the partnership, and to the consequent authority which one partner has to bind another in partnership transactions. The partners, originally, had a joint interest in the partnership effects. That interest continues joint after an act of bankruptcy of one, until, upon the taking of accounts, it is ascertained that there is a surplus; and then, each of the partners has a separate interest in that surplus. *Harvey v. Crickett (a)*, was cited, to shew that a transfer of partnership property by a solvent partner after an act of bankruptcy committed by his co-partner, is valid, even though the solvent partner had notice of his co-partner having committed an act of bankruptcy; but that decision is wholly inconsistent with the judgment of Lord *Eldon*, *In re Wait (b)*, where he decided that joint creditors, who have taken joint effects in execution subsequent to an act of bankruptcy by one of the

(a) 5 *M. & S.* 336.(b) 1 *Jac. & W.* 608.

partners,

partners, cannot retain them against the assignees under a separate commission. Speaking of an execution by a separate creditor, he says, "that it always appeared to him that the interest of the individual partner was all which a creditor of that individual could take, and that he must take it subject to all the partnership dealings." Then, speaking of the interest which either partner has, after a bankruptcy by one, he says, "If there is a partnership of *A.* and *B.*, the moment an act of bankruptcy is committed by one of them, *A.* for example, if a commission is issued on that day, or one is afterwards taken out which has effect from that time, — from that moment the partnership is put an end to. The question then is, what is the property of the insolvent partner *A.*, and what is the property of the solvent partner *B.*? *A.* may have no interest in the joint effects, no property at all; *B.* may have no property at all; I mean, they may have no *separate* or respective interests, because, until the whole demands of both *A.* and *B.* are settled, you cannot say whether any thing remains to be divided; and that must depend, not only on the demands against both, but on the demands which they may have against each other." The effect of that reasoning, if it be correct, is to shew, that the solvent partner has no power to dispose of any part of the joint property after the bankruptcy of his co-partner; and that is consistent with *Ramsbottom v. Lewis* (a), where it was held that after a secret act of bankruptcy committed by one of two partners, the other could not by an indorsement in the name of the firm transfer negotiable securities

1833.

 WOODBRIDGE
 against
 SWANN.

(a) 1 Camp. 279.

which

1833.

WOODBRIDGE
against
SWANN.

which existed before the act of bankruptcy. And *Abel v. Sutton (a)* is to the same effect.

Cur. adv. vult.

DENMAN C. J. in the course of the term delivered the judgment of the Court. After stating the facts of the case, his Lordship proceeded as follows: —

It is quite clear that *Ellis's* share of the joint effects was transferred to his assignees by relation to his act of bankruptcy, and it is equally clear that *Parker's* remained in himself after the bankruptcy of *Ellis*, and therefore the assignees and the solvent partner were tenants in common of all the partnership funds. It follows, that those who claim under the solvent partner are in the same situation, and according to the case of *Harvey v. Crickett (b)*, it makes no difference whether, at the time of acquiring the interest of the solvent partner, the party claiming under him had notice of the bankruptcy or not. In that case, all the previous decisions were considered; and the result of them is, that a creditor of the firm who is paid, fairly and without any contemplation of bankruptcy, by the solvent partner, after the bankruptcy of another, has a good defence *at law*, to an action by the assignees of both; as he would to an action by the assignees of the bankrupt partner, and by the solvent partner himself.

It was however urged that the case *In re Wait (c)*, decided by Lord *Eldon*, was a subsequent authority to the contrary; and if, upon referring to that case, we had thought that it had thrown any doubt upon the previous decisions in courts of law upon this subject, we certainly

(a) 3 *Esp.* 108.

(b) 5 *M. & S.* 336.

(c) 1 *Jac. & W.* 605.

should

should have granted a rule, with a view to the reconsideration of so important a question. But we are clearly of opinion that the authority of those cases is left untouched. The Chancellor, sitting in bankruptcy, exercises both a legal and *equitable* jurisdiction, and in the case cited, and in that of *Dutton v. Morrison* (a), Lord *Eldon* is considering the equitable rights of the assignees of the bankrupt partner, representing the general creditors.

1833.
—
WOODBIDGE
against
SWANN.

Whether the assignees of *Ellis*, for the purpose of paying the general creditors, have in this particular case any equitable claim against the defendants for the money which has been paid them, fairly and honestly, and in the course of business, by the solvent partner, is a question which does not belong to a court of law to decide.

With respect to the latter sum of 900*l.*, which was paid with the full consent of *Parker*, and of the assignees of *Ellis*, and without the least suspicion of fraud, there is not any question ; as it is quite clear that the assignees of *Ellis*, and *Parker* before his bankruptcy, could not have recovered it back, and it is equally clear that the assignees of both have no right to sue for it. We therefore refuse the rule.

Rule refused.

(a) 17 *Ves.* 194.

1833.

Saturday,
April 20th.DICKENSON *against* NAUL.

An auctioneer, employed by a supposed executrix, sold goods of the testator, but before payment, the real executrix claimed the money from the buyer: Held, that the auctioneer could not afterwards maintain an action against the buyer, though the latter had expressly promised to pay on being allowed to take away the goods, which he did.

ASSUMPSIT for goods sold and delivered. Plea, the general issue. At the trial before *Denman* C. J. at the last assizes for the county of *Lincoln*, it appeared that the plaintiff, an auctioneer, was employed to sell the stock of a farm by one *Anne Court*, supposed to be the widow and executrix of a deceased farmer of the name of *Court*, who had bequeathed by will his personal property to his wife *Anne*. The goods were sold by auction to the defendant, who, after an objection had been made to his taking them away without payment, promised, on his being allowed to do so, that he would pay. Long after the sale it was discovered that the testator had, at the time of his marriage with his supposed executrix, a wife living whose christian name was *Anne*, and she obtained probate and administered, and gave the defendant notice not to pay over the price of the goods to the plaintiff. Parol evidence was offered, but rejected, to shew that the testator intended to bequeath his property to his presumed wife. The defendant paid 3*l.* 1*s.* into Court on account of auction duty. Upon this evidence the Lord Chief Justice nonsuited the plaintiff; but reserved liberty to him to move to enter a verdict for the price of the goods.

Humfrey now moved accordingly (a), and he cited *Williams v. Millington* (b), *Coppin v. Walker* (c), and *Coppin*

(a) Before *Denman* C. J., *Littledale*, and *Parke* Js.(b) 1 *H. Bl.* 81.(c) 7 *Taunt.* 237.v. *Craig*

saund Pl. & Co. 168.

v. *Craig* (a) to shew that an auctioneer might maintain an action for goods sold by him in the course of his business, against a buyer. In the first of those cases Lord *Loughborough* said, that an auctioneer had a possession coupled with an interest in goods which he was employed to sell, and also a special property. He also cited *Cock v. Taylor* (b), to shew that the law would imply a contract from the circumstance of the purchaser having taken away the goods. Here too there was an express promise, and a good consideration for it; for the plaintiff, having parted with the goods, lost his lien for the price.

Cur. adv. vult.

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DENMAN C. J., during the term, delivered the judgment of the Court. We are of opinion that no rule should be granted. The action was brought for the price of goods, by an auctioneer, employed by a supposed executrix, named *Anne Court*, to sell the property of the testator as the goods of the executrix; but before it was paid for, it appeared that another person was the real executrix, who gave notice to the defendant of that fact, and claimed payment of the money. For the plaintiff it was contended, that the auctioneer had a right of action for goods sold by him in the course of his business; and undoubtedly he may sue, where the right of no third person intervenes. But where such right is established, and the person employing the auctioneer is proved not to be the owner, it then becomes clear that the auctioneer, who can have no interest in the goods but what he derives from his employer, has no longer any claim upon the property against the right owner. The defendant

(a) 7 *Taunt.* 245.

(b) 13 *East*, 399.

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was therefore justified in withholding payment to the agent of the supposed executrix after notice of the title of the real executrix, to whom he is certainly liable.

Rule refused.

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The KING *against* The Inhabitants of WROXTON.

To render a marriage invalid within the 4 G. 4. c. 76. s. 22. which enacts, "that if any persons shall knowingly and wilfully intermarry without due publication of banns, the marriages of such persons shall be null and void," it must be contracted by both parties with a knowledge that no due publication has taken place. And therefore, where the intended husband procured the banns to be published in a Christian and surname which the woman had never borne, but she did not know that fact until after the solemnization of the marriage: It was held, that the marriage was valid.

5 Bac. 246.

ON appeal against an order of two justices, whereby *Susannah Carpenter*, called therein the wife of *James Carpenter*, was removed from the parish of *Moreton Pinkney* in the county of *Northampton* to the parish of *Wroxton* in the county of *Oxford*, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

James Carpenter, the reputed husband of the pauper, is a parishioner of, and legally settled in, *Wroxton*, the appellant parish. In 1829 he courted the pauper, whose name was *Susannah Spencer*, and who was then living in service at *Kennington* near *London*; and she consented to marry him. He knew her name, and told her that he would see the banns properly published. She took no steps in the matter. He told her that they had been published. The marriage took place at *St. Mark's Kennington*, on the 8th of *October* 1829. The banns were published in the names of *James Carpenter* and *Agnes Watts*, and the register was produced, containing an entry of the 8th of *October* 1829 of the marriage of *James Carpenter* and *Agnes Watts* by banns; and the parish clerk, who attested the register, identified the pauper as the woman married under the name of

Agnes

Agnes Watts. The pauper had never gone by the name of *Agnes Watts*. In the marriage service, the clergyman used the name of *Agnes*, but no surname. The pauper, who till then believed that she was about to be married in her own name, looked at *Carpenter*, who told her to hold her tongue. The ceremony then proceeded. The clergyman wrote the name of *Agnes Watts* in the register; and the pauper, although she could write, was so frightened and confused, that she only made her mark under the name of *Agnes Watts*. On coming out of church, she told *Carpenter* that he had married her by a wrong name, and he said it would stand good, and that the banns had been published in the names of *James Carpenter* and *Agnes Watts*, but that it would save expense. Before he said this, the pauper did not know that the banns had been published in a wrong name. *Carpenter* then scratched the name of *Agnes Watts* out of the certificate, and inserted that of *Susannah Carpenter*.

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Waddington and *Reynolds*, in support of the order of sessions. The marriage in this case was valid, because the pauper, at the time of the solemnization, did not know that the banns had been unduly published. It would have been a void marriage by the 26 G. 2. c. 33., which, by sec. 2., enacts, that no parson, &c., shall be obliged to publish banns of matrimony unless the persons to be married shall, seven days at least before the time required for the first publication of such banns respectively deliver or cause to be delivered to him, a notice in writing of their true christian and surnames; and, by sec. 8., declares all marriages solemnized without publication of banns, or licence, null and void. On this statute, it has been held that a

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publication of the banns by a wrong name, was no publication at all. The consequence was, that a husband, to whom the publication of banns was usually entrusted, might, by his own fraud, render the marriage void. To prevent that, a new provision was introduced into the 4 G. 4. c. 76., which by sec. 22. enacts, that if any persons shall *knowingly and wilfully* intermarry without due publication of banns, or licence, the marriages of such persons shall be null and void to all intents and purposes. Now the words “*any persons*,” in the plural number, *primâ facie* import both parties, and if that be so, then, to render the marriage void, both parties should be cognizant of the undue publication of banns. When the statute is meant to apply to either of the parties separately, it is so expressed; as in sections 7. and 14. In *Wiltshire v. Prince* otherwise *Wiltshire* (a), Dr. *Lushington* forbore to decide the present question. This, being an act in restriction of the liberty of marriage, must be construed strictly, *Hodgkinson v. Wilkie* (b); and so construing the words “*wilfully and knowingly*,” they denote acts done with a consciousness that the party is doing wrong. That construction was put on similar words in the statute 9 Anne, c. 10., which imposes a penalty upon a postmaster wittingly, willingly, and knowingly detaining letters, and which was held not to apply to a case where the postmaster delivered letters to an assignee addressed to the bankrupt, *bonâ fide* believing that the assignee was entitled to have them. *Meirelles v. Banning* (c). Now here, the pauper, one of the parties to the marriage, did not know, until after she left the church, that the banns had been pub-

(a) 3 Hagg. Eccl. Rep. 332.

(b) 1 Hagg. Consist. Rep. 262.

(c) 2 B. & Ad. 909. See also *Holden v. Lawrie*, 3 Camp. 188.

lished

lished in a wrong name. Besides, the legislature seems to have assumed in sec. 23., that there may be a valid marriage where one of the parties to it knew that the banns had not been duly published; for it enacts, “ if any *valid* marriage shall be procured by a party thereto to be solemnized by banns between persons one or both of whom shall be under the age of twenty-one years, not being a widower or widow, such party knowing that such person under the age of twenty-one years had a parent or guardian then living, and that such marriage was had without the consent of such parent or guardian, *and knowing that banns had not been duly published according to the provisions of this act*, and having knowingly caused and procured the undue publication of banns, then it shall be lawful for the Attorney-General to sue for a forfeiture of all estate, &c. which hath accrued or shall accrue to the party so offending by force of such marriage.”

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Dwarris and *Humfrey* contra. The question undoubtedly turns on the 4 G. 4. c. 76. s. 22. which, in order to invalidate a marriage, requires two things: — 1st, a want of due publication of banns, and 2dly, that the parties should intermarry with a knowledge of that fact; for that is a fraud on the marriage act. Now the decisions on the statute 26 G. 4. c. 33., establish that the publication by banns must be in the proper names of the parties acquired by baptism or by reputation. The word *due*, in the statute 4 G. 4., if it makes any difference, renders the case stronger. Section 7. explains the intention of the legislature, for it requires the parties seven days at least before the time required for the publication of the banns respectively to deliver notice

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in writing of their true christian names and surnames, All the authorities on the construction of the statute 26 G. 2. c. 33. are collected in *Rex v. Billinghamst* (a), and are classified by Lord *Tenterden* in *Rex v. Tibshelf* (b), and they shew that where the banns are published in a name or names totally different from those which the parties, or one of them, ever used, or by which they were ever known, the marriage in consequence of that publication is invalid; but where there is a partial variation of name only, as the alteration of a letter or letters, or the addition or suppression of one christian name, the publication may or may not be void; the supposed mis-description may be explained, and it becomes the subject of inquiry, whether it was consistent with honesty of purpose or arose from a fraudulent intention. That being the state of the law before the late statute, the enactment contained in it, that marriages *knowingly and wilfully* had without due publication of banns should be void, was wholly unnecessary with reference to cases in which there had been only a partial mis-description, and must have been intended therefore to apply to cases where there had been a *total* mis-description, and, in such cases, to let in the same inquiry as to the motives of the parties which might, previously to that statute, have taken place where there had been a partial mis-description.

Then it becomes a question on the facts of this case, whether the parties did knowingly and wilfully intermarry without due publication of banns? Now, that must be inferred from the conduct of each at the time of the marriage. The object of the man clearly was

(a) 3 M. & S. 250.

(b) 1 B. & Ad. 190.

to elude the statute: he said his motive was to save expence; and as to the woman, as soon as the clergyman addressed her by the name of *Agnes*, she must have known that there had been a false description of her, and yet she afterwards put her mark to the register. She, therefore, assented to the false description, knowing at the time of the marriage that it was so. The 23d sec. of the 4 G. 4 c. 76. has no bearing in this case; the object of the legislature there was, in a case, where the woman had been deceived throughout, to deprive the husband of her fortune.

Cur. adv. vult.

DENMAN C. J. in the course of the term, delivered the judgment of the Court.

In this case, the sessions confirmed an order for the removal of *Susannah Carpenter*, as the wife of *James Carpenter*. The question was whether she was his wife, and turned upon the 22d sec. of the 4 G. 4 c. 76., the marriage act in force in 1829, when the ceremony was performed.

The case stated that *James Carpenter* prevailed upon *Susannah Spencer* to marry him, and told her he would see the banns properly published, and afterwards that they had been published. She took no steps in the matter. He, however, procured the banns to be published in the names of *James Carpenter* and *Agnes Watts*, which latter name the pauper had never borne. In performing the service, the clergyman applied to her the name of *Agnes*, till which time she believed that she was about to be married by her own name, and she did not know, until after the marriage, that the banns had been published in a wrong name.

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The facts above recited are the only material ones in the case. To shew the marriage void, the case of *Rex v. Tibshelf* (a), decided in this Court in *Trinity* term, 1830, was relied upon. This case was decided under the 26 G. 2., c. 33. commonly called The Marriage Act, which by sect. 8. provides that all marriages that shall be solemnized without publication of banns, or licence, shall be null and void to all intents and purposes whatsoever; and in a series of decisions on that statute, founded on a reference to the second section, it was held that the banns were to be published in the true names of the parties, otherwise it was no publication at all.

The words of the present act are wholly, and we must presume, *advisedly* different. The only clause avoiding a marriage for want of banns is the 22d, which enacts, that if any persons shall *knowingly* and wilfully intermarry without due publication of banns, or a licence first had and obtained, the marriages of such persons shall be null and void to all intents and purposes whatsoever.

We are of opinion, that in order to invalidate a marriage under this enactment, it must be contracted by *both* parties with a knowledge that no due publication of the banns had taken place. Now, the sessions have here negatived such knowledge on the part of the pauper.

The only decision which is reported on the effect of this section, is that of the case of *Wiltshire v. Prince* otherwise *Wiltshire* (b), in which Dr. *Lushington* expressly founded his judgment of nullity on the fact, that

(a) 1 B. & Ad. 190.

(b) 3 Hagg. Eccl. Rep. 332.

both

both the man and the woman were aware that the banns had been published in a manner calculated to conceal the identity of one of the parties. We therefore think the marriage valid, and confirm the orders.

Order of sessions confirmed.

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The KING *against* The Inhabitants of LONGNOR.

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UPON an appeal against an order of two justices of the borough of *Macclesfield* in the county of *Chester*, whereby *John Plant*, his wife and children, were removed from *Macclesfield* to the township of *Longnor*, in the county of *Stafford*; the sessions confirmed the order, subject to the opinion of this Court upon the following case:—

In the month of *April* 1811, the pauper *John Plant* (then a minor) was desirous of being apprenticed to *R. Robinson*, a shoemaker, living at *Longnor*, for whom the pauper had worked from the preceding *November*. An indenture was accordingly prepared by an attorney residing at some distance, upon properly stamped paper, and three seals were affixed to the bottom of the paper, opposite to which the names of the master, the pauper, and his father were to be written. The indenture was fetched away by the pauper's father to the pauper at *Longnor* to be executed; neither the pauper nor his father could write, and they requested one *Nadin* to write their names opposite to two of the seals at the bottom of the paper: this was done by *Nadin* in the presence of the pauper and his father. At this time the indenture was not read over, nor was any thing whatever said or done by *Nadin*, or the pauper, or by his father, except

An indenture having been prepared for binding a boy apprentice, the apprentice and his father, being unable to write, desired a third person to write their names opposite two of the seals, and he did so. The indenture was not read to them. The apprentice immediately afterwards took the indenture to the master and left it with him; and afterwards stated that when he did so he considered himself bound; and he went into service under the indenture:

Held, that the indenture was sufficiently executed and delivered.

Jacp. Touch. 54.

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the signing before mentioned by *Nadin*. The indenture was immediately taken by the pauper to his master, and left with him, and the master then signed his name opposite to the third seal: there was no attesting witness to the execution by any of the parties. In a month or two after the signing of the indenture, it was taken by the pauper, at the desire of the master, to the attorney who had prepared it, to get the date altered; and it was then, for the first time, read over by the attorney to the pauper, and was approved by him. The alteration was not made, and the pauper carried the indenture back, and gave it again to his master; and he served under the indenture nearly four years, residing in the appellant township. The pauper, who was called as a witness by the respondents, being asked by the Court with what intention or for what purpose he gave the indenture to his master, answered, "when I gave it to my master, I considered myself then fast;" and afterwards stated, in answer to another question from the Court, that he considered himself bound from the time of signing, and ever afterwards. The question for the opinion of the Court was, whether the indenture was so executed as to enable the pauper to acquire a settlement by service under it.

Lloyd in support of the order of sessions was stopped by the Court, who called upon

The Solicitor General and *Cottingham* contra. There was no execution of this indenture by the father or the apprentice. It was never read to either before the execution. [*Parke J.* They may have read it themselves, for the case does not state that they could not read,

read, but merely that they could not write. In 4 *Cruise's Dig.* 27., it is said the deed should be read if any of the parties require it; and if a person can, he should read it himself; if he be blind or illiterate, some other should read it for him, and *Manser's* case (a) and *Thoroughgood's* case (b) are cited.] Secondly, there was no delivery of the deed.

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DENMAN C. J. I have no doubt that there was a sufficient execution of this indenture both by the father and the apprentice. They might execute and deliver it without reading, taking the contents for granted, as many would do.

LITTLEDALE J. I am of the same opinion. I think there was a sufficient delivery and execution of the deed; for the father and son met for the purpose of executing it, their names, by their authority, were written opposite to two of the seals, and the pauper afterwards delivered the deed to his master (c).

PARKE J. I am of the same opinion. The son delivered the deed to his master, and the signatures of the father and son were written by their authority.

Order of sessions confirmed.

(a) 2 *Rep.* 3.

(b) 2 *Rep.* 9.

(c) See *Shelton's* case, *Cro. Elix.* 7. *Doe* dem. *Garnons v. Knight*, 5 *B. & C.* 671.

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April 20th.

The KING *against* The Inhabitants of
HAUGHLEY.

By an act of parliament, all persons seised of land of the annual value of 30*l.* in the hundred of *Stow*, were incorporated by the name of the guardians of the poor within the hundred of *Stow*, in the county of *Suffolk*, and were to have a common seal, and the poor of the hundred were to be placed under the management of the corporation; and the directors and acting guardians, whom the corporation were authorized to appoint in the manner therein mentioned, were empowered, with the consent of two justices, to bind any poor child, under their management, apprentice in like manner as churchwardens and overseers of the poor, with assent of the justices of the place, were then by law empowered to do.

By indenture, the directors and acting guardians of the poor of the hundred of *Stow*, with the consent of two justices, bound out a poor boy under their management, an apprentice for one year, and affixed to the indenture the common seal of the corporation, but it was not otherwise executed by the directors and acting guardians: Held, that the indenture was invalid.

UPON an appeal against an order for the removal of *Thomas Rampling*, his wife and son, from the parish of *Mendlesham* in the hundred of *Stow*, to the parish of *Haughley*, both in the county of *Suffolk*, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

By an act of the 18 G. 3. c. 35., all persons seised of messuages, lands, tenements, and hereditaments, of the annual value of 30*l.* and upwards, in the parishes within the hundred of *Stow* in the county of *Suffolk*, were incorporated by the name of “the guardians of the poor within the hundred of *Stow* in the county of *Suffolk*,” and were to have a common seal, and to sue and be sued by that name, and the poor in the said hundred were placed under the management of the said corporation; and it was enacted, that it should be lawful for the directors and acting guardians thereafter mentioned, at any general meeting, or at any of the quarterly meetings by that act directed to be held, with the consent of the justices of the peace, to bind any poor child or children under their management apprentice for such term as they should see fit, not exceeding seven years, in like manner as churchwardens and overseers of the poor,

with

2 Bac. 817.
5— — 601.

with the assent of the justices of the peace, were then by law empowered to do. The act afterwards directed, that the acting guardians, or so many of them as should think fit, should assemble on the 24th day of *June* then next, and elect by ballot twelve of the guardians, who should be called directors of the poor within the said hundred. The qualification of a director was, the being seised of messuages, &c., of the annual value of 30*l.*; but it was provided, that such of the guardians as were seised of messuages, &c., of the annual value of 400*l.*, and the justices resident in the hundred, should be directors without ballot. A poorhouse was to be built under the management of the directors; and upon its being finished, a general meeting of the guardians was to be held, at which the vacancies which had occurred among the directors who had been ballotted for were to be filled up; and the guardians were at a meeting to elect twenty-four guardians, who, together with the directors qualified as aforesaid, and the twelve directors chosen by ballot, were to be the directors and acting guardians of the said hundred, for putting in execution all the powers and authorities of that act. The directors and acting guardians were to hold four general quarterly meetings in each year; one of them to be always held on the *Friday* after the 24th of *June*, and to be for filling up vacancies in the directors chosen by ballot, and for choosing acting guardians; after which the acting guardians were at such meetings to choose six persons from among themselves, who, with the directors, were to audit the accounts, and to choose a treasurer and clerk; and they were thereby authorised and required to transact and do all other business to be done at such quarterly meetings respectively, in pursuance of that act.

By

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By an act of the 5 G. 4. c. xviii., for altering and enlarging the power of the recited act, the provisions in the 18 G. 3. c. 35. respecting apprenticeships were repealed, and re-enacted with a clause enabling the directors and guardians, present at any meeting held in pursuance of the 18 G. 3., to bind poor children by indentures *under the common seal of the corporation.*

A quarterly meeting of the directors and acting guardians being duly held under the directions of the act 18 G. 3., by an indenture bearing date the 1st day of *October* 1821, it was witnessed that the directors and acting guardians of the poor within the hundred of *Stow* in the county of *Suffolk*, incorporated for the better relief and maintenance of the poor within the said hundred, by and with the consent of two justices for the said county whose names were subscribed, and in pursuance of an order of two justices of the said county therein also named, did put and place *Thomas Rampling*, a poor child belonging to the parish of *Gipping*, within the said hundred, and residing at and maintained in the house for the poor within the hundred, apprentice to *Robert Steggall* of *Gipping*, for the term of one year. To this indenture the common seal of the corporation was affixed at such meeting, but the indenture was not otherwise executed by the directors and acting guardians. It was executed by the master. The pauper served the year, sleeping in the parish of *Gipping*. The question was, whether or not this binding, previous to the statute 5 G. 4. c. xviii., was valid under the 18 G. 3. c. 35.

Kelly and *Austin* in support of the order of sessions. The binding was not valid, because the indenture was not signed, sealed, and delivered by the directors and
acting

acting guardians. The 18 G. 3. c. 35. empowers them to bind out apprentices in like manner as churchwardens and overseers of the poor are, by law, empowered to do. Those officers are empowered to bind out poor children by the 43 *Eliz. c. 2.*, and 8 & 9 *W. 3. c. 30.*, and they must execute the indenture. It may be said that the indenture is the deed of the corporation. But the act makes all owners of land of the annual value of 30*l.*, the corporation. Here the binding purports to be by the directors and acting guardians. They are a part only of the corporation; they did not act in a corporate capacity. In an *Anonymous* case (a) Lord *Holt* says, that if a person, pretending to be mayor of a corporation, puts the corporation seal to a deed, yet it is not by that the deed of the corporation. So here, the directors and guardians had not power to affix the corporate seal: the consequence, therefore, is the same, if they assume to have acted on the part of the corporation. If they acted as individuals, there was no delivery of the deed. Where a special power is delegated to a part of a corporation (that not being a corporate act) it must be executed with all the formalities required in other cases. The 5 G. 4. c. xviii., passed long after the indenture in case was executed, does in express terms give to the directors and acting guardians power to bind out apprentices under the seal of the corporation. If they had this power before, that enactment was unnecessary.

Palmer contra. The corporation of the guardians of the poor within the hundred of *Stow* consists of all

(a) 12 *Mod.* 423.

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owners of land of the annual value of 30*l*. The directors and acting guardians are the governing body. They are to purchase land, and make contracts. It is incident to a corporation to have a seal, but it may be affixed by a part of the whole body. They had no power to bind out except as a corporation. The binding, therefore, was a corporate act, evidenced by affixing the corporate seal. A binding out by the directors and acting guardians, as private individuals, would be bad. They are required to meet quarterly, for the purpose of binding out poor children, or to do so at the general meetings. If they might bind out as individuals, they might meet for that purpose at any time. The dictum of Lord *Holt* does not apply, for he is speaking of the affixing of the corporate seal by a stranger to the corporation: here the directors and guardians were not strangers; they acted as the agents of the corporation, when they executed the indenture:

DENMAN C. J. The indenture was not executed in the name of the corporation, and is not their deed; and if executed in pursuance of the special power reserved by the 18 G. 3. to the directors and acting guardians, it should have been signed and sealed by each of them. The binding was invalid.

LITTLEDALE J. I am of the same opinion. The name of the corporation is the *Guardians of the Poor* within the hundred of *Stow*. The binding parties to this indenture are the directors and acting guardians. They are in the nature of a committee of the corporation appointed for certain purposes.

PARKE J.

PARKE J. The argument is, that the directors and acting guardians meant to act as the agents of the corporation. But, assuming that to be so, the corporation should have been the binding parties, and the indenture should have been their deed. That brings it to the question whether it is their deed, which again depends upon this, whether they are described as the binding parties by their true corporate name. Now the doctrine upon that subject, as established in the case of the *Mayor and Burgesses of Lynn* (a), and recognized in that of the *Croydon Hospital v. Farley* (b), is, that in grants or conveyances the name of a corporation must be the same in substance with the true name, but need not be the same in words or syllables. Applying that rule to the present case, it seems to me that "the directors and acting guardians of the poor" is not in substance the same name as "the guardians of the poor." That being so, the binding, not being by the corporation, is invalid.

Order of sessions confirmed.

(a) 10 Co. 124.

(b) 6 Taunt. 467.

EMPSON, Gent. one, &c. *against* WILLIAM SODEN
and GEORGE SODEN.

Saturday,
April 20th.

TROVER for one cart-load of box and one thousand plants of box. Plea, not guilty. At the trial before Denman C. J. at the last *Warwick Assizes*, the material facts appeared to be as follows. Mrs. Mackie was tenant to one Morris of a house and garden, which she gave up at *Michaelmas* 1830, and was then succeeded

A tenant (not a gardener by trade) cannot remove a border of box planted on the demised premises by himself, unless by special agreement with the landlord.

J Bac. 396

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ceeded by the defendant *George Soden*. Before her tenancy expired, she sold to the plaintiff a quantity of box which she had brought upon the premises, and planted as borders to a walk made by her in the garden. After *Michaelmas*, the plaintiff came upon the premises to take away the box, and had dug up some of the plants, when the defendants obliged him to desist, and to quit the place, leaving behind the plants which he had rooted up. Some evidence was given to shew, that *Mrs. Mackie*, before giving up possession, had had licence from *G. Soden*, the incoming tenant, to leave the box upon the premises till it could conveniently be removed. The case ultimately turned upon the question, whether growing box were such an article as could be removed by a tenant during the term. On this point, the plaintiff was nonsuited, with leave to move to enter a verdict for one shilling damages.

Humfrey now moved accordingly. The strictness of the law with respect to things annexed to the freehold has been much relaxed in modern times, and the rule, as deduced from the cases in *Amos* and *Ferard* on Fixtures, p. 77. is, “ that a tenant is entitled to take away certain things which he has at his own expence affixed to the demised premises for the purpose of ornament and furniture. And the principle on which this rule is founded appears to be, that as annexations of this nature must generally be designed for temporary purposes only, it would greatly incommode tenants in the enjoyment of their estates, if, by every slight attachment to the freehold, the property should immediately be changed, and pass over to the reversioner.” Every case of this kind must depend mainly on its own circumstances. This principle

ciple was lately acted upon in the Common Pleas, in *Grymes v. Boweren* (a). [Parke J. There is no authority for saying that an ordinary tenant may take up growing trees without a special agreement for that purpose.] The question is whether any damage results to the freehold. Could not a tenant remove flowers which he had planted in the ground? [Littledale J. No. Denman C. J. A border of box is a thing intended to be permanent. Parke J. It might as well be contended that a tenant could take up hedges].

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Per Curiam. There must be no rule.

Rule refused (b).

(a) 6 Bingham 437.

(b) See *Penton v. Robart*, 2 East, 90., and *Wyndham v. Way*, 4 Taunt. 316.

STEARNS *against* WILLIAM MILLS and ELIZABETH WRIGHT, Executor and Executrix of JAMES WRIGHT.

Monday,
April 22d.

DEBT on testator's bond for the payment of money. Plea, by *Mills*, plene administravit; judgment by default against *Wright*. At the trial before *Gurney B.* at the *Suffolk* Lent assizes 1832, it appeared that the testator died in 1816, and that the will was proved by both defendants, on which occasion an in-

The inventory exhibited in the Ecclesiastical Court by an executor, for the purpose of obtaining probate, is not generally prima facie evidence of his having received assets. 3.822, 3.828, 3.828, 3.828

Semble, (per *Parke J.*) that where the inventory only describes effects on a farm with which the executor was acquainted, it may be prima facie evidence; but this is rebutted if it appear that no effects actually came to the executor's hands, though his co-executor has, with his knowledge, intermeddled with the property.

Semble, (per *Littledale* and *Parke Js.*) that a probate stamp is not prima facie evidence that the executor has received assets to the amount covered by the stamp.

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U u

ventory

Found Pl & Co. 512.

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ventory of the effects was exhibited in the Ecclesiastical Court: Mrs. *Wright* produced it, but *Mills* was present and acquiesced, though without saying anything; and neither signed it. The inventory comprised only the stock upon the farm occupied by the testator at the time of his death, amounting in value to 1,105*l.*; there were other effects, and likewise debts and monies of the testator, which were not included. The probate stamp was 30*l.* No other inventory appeared ever to have been exhibited. Mrs. *Wright* continued in the occupation and management of the farm (according to the desire of the testator) till 1830. *Mills* knew of her doing so, and was himself occasionally at the farm; but it was not shewn that any of the effects actually came to his hands. Upon this case the learned Judge, being of opinion that the inventory was in itself proof of assets received, unless that conclusion were rebutted by other evidence, directed a verdict for the plaintiff against *Mills*, with leave to move to enter a nonsuit as to him, if the Court should consider that the proof of assets, as against him, was not sufficient. A rule nisi having been obtained for this purpose,

Biggs Andrews and *Austin* now shewed cause. There was evidence to go to the jury against *Mills*. In 4 *Burn's Ecclesiastical Law*, tit. *Wills*. V. 1., it is said, that "at the time of probate or administration granted, it is required that the executor produce an inventory of the goods, chattels, and credits," and take an oath to exhibit such further inventory as shall be lawfully required: it is added that, "if an executor, without making an inventory, shall intermeddle himself with the administration of the goods" (except in particular cases), "he shall be bound to

to answer to every one of the creditors his whole debt," and also to pay legatees their legacies; "for in this case the law presumeth that there are sufficient goods to pay all the legacies, and that the executor doth secretly and fraudulently subtract the same; whereas otherwise, the executor is presumed not to have any more goods which were the testator's than are described in the inventory, the same being lawfully made." [*Parke J.* The practice of producing an inventory is disused now: the modern authorities on the subject are collected in a note to the new edition of *Burn (a)*.] This relaxation is also noticed by *Toller, Law of Executors*, 6th ed. p. 249.; but he adds that a prudent person will make an inventory, and that if a party administer without doing so, the law will suppose him to have assets, unless he repel the presumption; and *Burn* says, vol. 4., tit. *Wills*. V. 20. (b), that, if an inventory be not made according to the ecclesiastical law and the statute 21 *H. 8. c. 5. s. 4.* yet, by the practice of the courts, if it be properly made and exhibited in due time on the oath of the executor, it shall receive credit, and the party exhibiting be freed from the burden of proving its truth, that is, that the deceased had no more goods; and the proof of goods having been omitted shall be thrown upon the legatary or other person claiming interest in the goods. And it is added, that by the oath here mentioned is to be understood the oath taken at the time of probate granted; unless another inventory on oath be afterwards called for. In *Orr v. Kaines (c)* it is said, that an executor is at liberty to prove that the money for which he has charged himself by inventory, never came to his hands;

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(a) 8th edit. by *Tyrwhitt*, p. 293. note 3.

(b) Page 310. 8th edit.

(c) 2 *Ves. sen.* 193.

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which shews that it would *primâ facie* be binding. In *Parsons v. Hancock* (a), it appears to have been so considered. [Parke J. I do not believe that, in that case, the inventory was exhibited at the time of proving the will; and this point was not raised.] In 2 *Starkie on Evidence*, 322. it is said that “In proof of assets, the plaintiff may give in evidence the inventory of the personal estate of the deceased, delivered by the defendant in the Ecclesiastical Court;” and “evidence of such an inventory is sufficient to throw it on the executor to shew how he has disposed of the goods and money specified in the inventory;” and *Ayliff v. Ayliff* (b), and *Giles v. Dyson* (c) are cited. [Parke J. It appears from the nature of the disbursements in the last case, that the inventory could not have been the one exhibited at the time of proving the will.] In the present case, at all events, the inventory was exhibited on proving the will; it was that which the statute binds an executor to put in, and which he derives a benefit from exhibiting. Having done so and proved the will, he was bound to see to the property. Instead of turning it into money, he voluntarily allowed the widow to continue in possession of it, at a risk of any loss that might ensue. He, therefore, is chargeable, though he may not himself have received the profits, *Churchill v. Hopson* (d), *Sadler v. Hobbs* (e), *Crosse v. Smith* (g). [Parke J. In the last case the money had actually come to the hands of the party whose co-executor misapplied it.] Here *Mills* had ascertained the amount, and knew that *Wright* was disposing of it. But it is sufficient to say, that the inventory itself was *primâ*

(a) 1 M. & M. 330.

(b) Bull. N. P. 142. b.

(c) 1 Stark. Rep. 32.

(d) 1 Salk. 318.

(e) 2 Bro. C. C. 114.

(g) 7 East, 246.

facie

facie proof of assets having come to *Mills's* hands. There was some evidence; and, at least, it was not rebutted. The amount of the probate stamp has been held sufficient proof of assets, in absence of any answer by the executor, *Foster v. Blakelock* (a).

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Storks Serjt. and *Kelly* contra. The document referred to had nothing of the character of an inventory; and as to the other part of the case, there was no proof of *Mills* having taken part in the management of the farm, or received assets. [*Parke J.* The learned Judge seems to have thought that the non-interference with the property was made out, and to have put the case merely on the legal inference from the exhibition of an inventory.] He can only be held liable on the assumption, for which there is no ground, that assets actually have come into his possession. In *Crosse v. Smith* (b), the executor had received them. That the amount recoverable against an executor, on *plenè administravit* pleaded, is the amount of assets really in his hands, was held by Lord *Mansfield* in *Harrison v. Beccles* (c); and the principle, that the actual receipt of assets is the ground of liability, is recognized in *Parsons v. Hancock* (d). But, in the present case, the learned Judge considered the question of fact on this subject as concluded by the exhibiting of the inventory.

DENMAN C. J. I am of opinion that the inventory delivered by an executor on proving the will is not, in itself, evidence of assets having come to his hands: and

(a) 5 B. & C. 328.

(b) 7 East, 246.

(c) 3 T. R. 688.

(d) 1 M. & M. 330.

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the fact, in this case, of *Mills* having occasionally gone to the farm, is not sufficient to affect him with liability as an executor having had possession of the property. In some of the cases cited, it does not appear that the inventory relied upon was that which is delivered by the executor in the first instance; in one it was clear, from the items of disbursement and other circumstances, that the inventory was one subsequently given in, and relating to assets received. Then, as the finding of the jury in this case was governed by the presumption supposed to arise from the delivery of an inventory, I think the defendant *Mills* is entitled to have a verdict entered for him.

LITTLEDALE J. I am of the same opinion; and it is not necessary here to consider whether an inventory, in some cases, may or may not be evidence of assets received: it was not so under the circumstances of this case. It was, indeed, stated here that nothing came to the hands of *Mills*; but I do not agree in the general proposition, that an executor, who has exhibited an inventory, is bound to shew that he received no assets; because, even if that did not appear, I think an inventory, exhibited as this was, would be no evidence against him. An executor is not obliged, before proving the will, to go into any distant county, where effects of the testator may be, to ascertain their real value; it is sufficient if he receives such information as he is able to obtain, and then exhibits an inventory to shew, as far as possible, the amount of the property to be administered: one object of which is, to ascertain the fees to be taken on the probate, pursuant to the statute 21 *H. 8. c. 5*. There may be goods in the hands of a factor, who may
prove

prove insolvent; it cannot be said that an executor, by including them in the inventory, charges himself with them as assets. I was not present at the decision of *Foster v. Blakelock* (a); the point, in that case, regarding the effect of a probate stamp, as primâ facie evidence of assets, does not seem to have been much considered; and the stamp, in such a case, is the less conclusive, as the Stamp Act (b) requires the whole value of the estate and effects to be sworn to, without deducting any thing on account of debts due from the deceased.

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5, 11-2 725

PARKE J. Assuming that the inventory, here, was exhibited by both defendants, of which I have some doubt, it could be only primâ facie evidence. I will not say whether such an inventory as this would not be primâ facie evidence, since it related wholly to effects which were upon the farm, and did not include any debts. But if so, the evidence was clearly rebutted, by proof that *Mills* never did, in fact, take possession. To say generally, that the mere circumstance of having joined in an inventory for the purpose of obtaining probate, renders an executor liable, would be going further than is warranted by any authority. No doubt, it was rightly held, in *Crosse v. Smith* (c), that an executor, having received assets, cannot discharge himself by paying the money over to his co-executor. Here, however, the presumption of such receipt is not raised; but, on the contrary, rebutted by the evidence. The point referred to as decided in *Foster v. Blakelock* (a), does not appear to have under-

(a) 5 B. & C. 328.

(b) 55 G. 3. c. 184. s. 38.

(c) 7 East, 246.

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gone much discussion there; and I cannot concur in that decision. One objection is, that for the purpose of the stamp duty, the executor must include, in the amount sworn to, debts due to the testator, though not recovered. I am of opinion, that in the present case, *Mills* was not shewn to be responsible, and that he was entitled to a verdict.

Rule absolute to enter a verdict for *Mills*.

Tuesday,
April 23d.

ROBERTS *against* DAVEY.

NC 703
Ad 1442
1848-49

Trespass for breaking and entering the lands of the plaintiff, and sinking pits. Plea, that before the plaintiff had any thing in the said lands, one *U.* was seised in fee of one undivided third part therein, and, by indenture, granted to *B.*, licence to dig, mine, &c. throughout his one third part, with liberty to erect engines, &c. for the term of twenty-one years; that before the expiration of the term the grantee died, and his executrix became legally entitled to the enjoyment of the licence, and because she could not enjoy it so fully as it was lawful for her to do without committing the supposed trespasses, the defendant; as her servant, entered upon the said lands, and upon the plaintiff's possession, and committed the same.

TRESPASS for breaking and entering the lands of the Plaintiff, called *Carvannell*, in the parish of *Gwennap*, in the county of *Cornwall*, and sinking shafts, and carrying away ore. Plea, that on the 7th of *June* 1821, long before the said time, when, &c., and before the Plaintiff had any thing in the said lands, one *Stephen Ustwicke* was seised in fee of one undivided third part in the said lands; and by indenture between him of the one part, and *John Bullocke* of the other part, he, *Ustwicke*,

Replication, that the supposed licence was granted subject to a condition, "that if the grantee, his executors, &c. should neglect to work the mines for a certain time, or should fail in the performance of all or any of the covenants, then and from thenceforth the indenture and the liberties and licences thereby granted, should cease, determine, and be utterly void and of no effect." Averment, that the grantee, for a space of time exceeding that specified, neglected to work the premises, contrary to the condition, and the licence thereby became utterly void:

Held, on general demurrer to the replication, that the word *void* in the proviso meant *voidable* at the election of the grantor, and, therefore, that it was necessary for the plaintiff to allege that the grantor or some person claiming under him (which it was not shewn that the plaintiff did) had by some act evinced his intention to avoid the licence.

4 Bac. 884.
1 --- 34.

granted

granted to *Bullocke*, his executors, administrators, and assigns, full and free liberty, licence, and authority to dig, mine, and search for tin, tin ore, and all other ores, metals, and minerals within, throughout, and under all that, his one third part undivided, of and in the said lands, with free liberty, licence, power, and authority to erect such engines and buildings, &c. as might be useful and convenient in the use and exercise of such several liberties, licences, &c.; and also to divert and use waters and water-courses, for the purpose of working such engines, and to make new leats for carrying off water for the like purpose; to have and to hold the liberties, licences, &c. thereby granted to the said *J. B.* &c. for the term of twenty-one years. Averment, that before the expiration of the said term, &c., to wit, on and before the times when, &c., *J. B.* made his will, and appointed one *Betsey Lovell Bullocke*, his wife, executrix, and died; that she duly took upon herself the execution of the said will, and became and was legally entitled to the use, exercise, and enjoyment of the liberty, licence, and authority so granted by the said indenture to *Bullocke*, his executors, &c. for the residue of the term. The plea then stated, that because, without committing the said trespasses, the said *Betsey Lovell Bullocke* could not, at the times when, &c. have or enjoy the said liberty, licence, and authority so fully and effectually as it was lawful for her to do, the defendant, as her servant and by her command, entered into and upon the lands in which, &c. in and upon the plaintiff's possession thereof, and committed the supposed trespasses.

Replication, that the supposed liberty, licence, and authority were granted subject to a condition, that if *J. B.* his executors, &c. should, at any time or times, neglect

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neglect effectually to work the said premises, by the said supposed indenture granted, for any time or times exceeding in the whole six calendar months in any one year of the said term, or should not work effectually such mine or mines, and the veins and lodes discovered, or to be discovered, within the said premises, unless hindered by unavoidable accident, or should fail in the performance of all or either of the covenants, &c. in the said supposed indenture contained, then, and from thenceforth, that supposed indenture, and the liberties, licences, powers, and authorities thereby granted, and every of them, should cease, determine, and be utterly void and of no effect to all intents and purposes. The replication then averred, that *J. B.* in his lifetime, and the executrix afterwards, for a space of time exceeding in the whole six calendar months, &c., neglected effectually to work the said premises by the said supposed indenture granted, he the said *J. B.* not having been during the said time hindered by unavoidable accident, contrary to the condition of the said indenture, and true intent and meaning thereof, whereby the said supposed indenture, and the said supposed liberty, licence, and authority, long before the committing of the trespasses mentioned in the plea, to wit, on the 8th *December* 1822, ceased, determined, and became and were utterly void and of no effect.

General demurrer and joinder.

Follett in support of the demurrer. The instrument set out on the record is a licence granted by *Ustwicke* before the plaintiff had any interest in the land in question; and the latter, in his replication, without connecting himself with *Ustwicke*, or shewing any authority from him,

him, or any person claiming under him, states merely that *Bullocke* had not performed certain covenants in the lease, and that the lease thereby became void. It follows, therefore, that if the license be not absolutely void, but voidable only at the option of the grantor, the replication is bad. Now *Doe* dem. *Bryan v. Banks* (a) shews that a lease with a proviso similar to that in this license is voidable only at the option of the lessor. There the lease was of coal mines for ninety-nine years, reserving a royalty rent for every ton of coals raised, and a proviso that the lease should be void to all intents and purposes if the tenant should cease working at any time for two years; and it was held that the true construction of the proviso was, that the lease was only voidable at the option of the lessor. In *Arnsby v. Woodward* (b) the proviso was, "that if the rent should be in arrear for twenty-one days after demand made, or if any of the covenants should be broken, the term thereby granted, or so much thereof as should be unexpired, should cease, determine, and be wholly void; and it should be lawful for the landlord to enter and the same to hold to his own use, and expel the lessee." It was held that this, in the event of a breach of covenant, made the lease voidable and not void; and that the landlord was bound to enter in order to take advantage of the forfeiture, and that, not having done so, he waived the forfeiture by a subsequent receipt of rent. In *Rede v. Farr* (c), there cited, it was held that such a proviso did not make the lease voidable by the lessee, on the principle that a party shall never take advantage of his own

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(a) 4 B. & A. 401.

(b) 6 B. & C. 519.

(c) 6 M. & S. 121.

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wrong. If it might be determined at the option of the person in possession, the landlord might thus be deprived of the benefit of all the covenants: and if a stranger, like the plaintiff, could treat it as void, the landlord might be deprived of a beneficial rent when he and the tenant were agreed that the lease should continue. The result of the authorities is, that the difference supposed formerly to exist between leases for lives and for years, as to the necessity of an entry to avoid the lease, no longer exists. That being so, it follows that in order to avoid this licence the grantor or some one in privity with him should either have entered, or done some act shewing his intention to determine the licence.

Jeremy contra. The instrument set out upon the record, passed to the grantee no interest in the soil, but a mere easement in it. It is not a lease; but contains a mere licence to dig and search for minerals, subject to a condition; *Doe* dem. *Hanley v. Wood* (a). The consideration of the grant was the render of the ores. The performance of that condition goes to the whole consideration of the grant, and, as in any case of mutual and dependent covenants, must have been averred in pleading by the grantee, for the purpose of enforcing such grant: 1 *Wms. Saunders*, 320. d. n. 4. Here, if there be no performance, the whole profit of the subject matter of the grant will be lost to the lord for the whole term. Then, this being a licence for a term of years, to dig for minerals, subject to a condition that it should be void on the grantee's neglecting to work the mines for the time therein mentioned,

(a) 2 B. & A. 724.

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it became, on such neglect, absolutely void; and not merely voidable at the option of the grantor. Even as to leases, there is a distinction in this respect between leases for lives and for years. In the former, if the tenant be guilty of any breach of the condition of re-entry, the lease is only voidable, and not determined until the lessor re-enters, or brings an ejectment for the forfeiture; but, in a case of a lease for years, it is absolutely determined by the breach. 1 *Wms. Saund.* 287. c., note 16. In the cases cited on the other side, the leases were undoubtedly for years; but they passed an interest in the land, and not as this grant does, a mere easement in it. In *Arnsby v. Woodward* (a), there was a clause of re-entry superadded to the provision for avoidance, and the Court held that both were to be construed together, as amounting only to a power of determining the lease by re-entry, and that a subsequent acceptance of the rent was a recognition of a lease still subsisting. In *Doe dem. Bryan v. Bancks* (b), a tenant attempted to insist on a forfeiture created by his own act, and thereby to convert the term into a yearly tenancy; but the Court held, that the lease did not become void, unless the landlord thought fit to make it so; and there was a subsequent receipt of rent. In *Rede v. Farr* (c), a proviso for avoidance on nonpayment of rent was held not to enable the lessee to vacate the lease; and that upon the principle that a party cannot take advantage of his own default. Here the plaintiff, who, in the pleadings, is admitted to be in lawful possession, stands in the situation of the original grantor. [*Denman* C. J. That does

(a) 6 B. & C. 519.

(b) 4 B. & A. 401.

(c) 6 M. & S. 121.

not

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not appear. It is consistent with the facts stated in the pleadings, that the plaintiff may be the owner of the other two thirds. *Parke J.* Possession is not sufficient, provided it be necessary that some one in privity with the grantor should have done an act to determine the licence.] No entry or claim by the grantor, or any person claiming under him, was necessary to determine this licence. A licence lies only in grant, and not in livery; and, therefore, re-entry is not necessary to determine it. There is a distinction between a condition annexed to a freehold lease and one annexed to a lease for years. A lease for life cannot commence by words without other circumstances, viz. livery and seisin, and therefore shall not be determined without entry; but a lease for years may begin by words without entry, and may be determined by words without entry, *Browning v. Beston (a)*; and *Co. Litt.* 214. *b.* is to the same effect. And when the land itself remains in the possession of the grantor, no entry or claim by him is necessary to determine the grant. In *Co. Litt.* 218. *a.* it is said, "if I grant a rent-charge in fee out of my land upon condition, there, if the condition be broken, the rent is extinct in my land, because I (that am in the possession of the land) need make no claim upon the land, and, therefore, the law shall adjudge the rent void without any claim." In *Digges's* case (*b*) it is said to have been agreed in 20 *E. 4.* 18 and 19 *a.*, that "if a feoffment be made upon collateral condition, and before the condition performed the feoffee leases it to the feoffor, if afterwards the feoffee doth not perform the condition, the land shall be in the feoffor immediately

(a) *Plowden*, 135, 136. 1 *Wms. Saund.* 287. *c.* note 16.

(b) 1 *Rep.* 174. 5th edit.

without

without entry or claim, *because he himself is in possession of the land*. So if a villein purchases rent which is issuing out of the lord's land, it shall be in the lord without entry or claim of the lord; for if he should make an entry or claim, it ought to be upon the land, and that is not necessary *when he himself is seised thereof*."

The necessity of an entry depends on the wording of the condition. "If the words be, that upon the doing of an act the reversioner may enter, there must be an entry to avoid the estate; but if the estate be granted upon condition that if the grantee do such an act the estate shall thereupon immediately cease and determine, then no entry is necessary:" per *Bayley J.* in *Fenn dem. Matthews v. Smart (a)*.

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DENMAN C. J. There is nothing to connect the plaintiff with *Ustwicke*, and it is possible he may have come in by title inconsistent with that of *Ustwicke*, who had only a third part in the lands. Assuming, however, that it had appeared that he represented the grantor of the licence, I think it quite clear, according to *Doe v. Bancks (b)*, and on the wording of this grant, that it was necessary for him to have done some act shewing his intention to determine the licence; until such act were shewn, it continued in force.

LITTLEDALE J. The replication cannot be supported; it seems to me that, according to *Doe v. Bancks (b)*, this instrument was liable to be rendered void only at the election of the grantor. If it had been a freehold lease of land subject to a condition

(a) 12 East, 448.

(b) 4 B. & A. 401.

that

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that it should be void on non-performance of covenants, it would have been necessary for the lessor to avoid it by entry; or, if that that were impossible, by claim. This instrument is a mere licence to dig, and did not pass the land. An actual entry, therefore, was unnecessary to avoid it; but by analogy to what is required to be done in order to determine a freehold lease, which, by the terms of it, is to be void on the non-performance of covenants, it seems to follow that, to put an end to this licence, the grantor should have given notice of his intention so to do. The giving of such notice in the case of an instrument like this is equivalent to an entry or claim by the grantor of a freehold estate to which a condition is annexed. Till such notice were given, the right of possession in those claiming under the licence was so far continued that the plaintiff, who, for any thing that appears, was a stranger to *Ustwicke*, could not take advantage of the breach of condition. If the plaintiff had set out his title, and shewn that he claimed under *Ustwicke*, the case might then be different.

PARKE J. The question is, upon the construction of this instrument, whether the grant is void, or voidable only on the default in question. If it be void, the plaintiff is entitled to judgment; if it be voidable only, then, as it does not appear that the grantor did any act amounting to an exercise of his option, the defendant is entitled. It is not necessary to decide whether the word void means voidable by entry, or voidable by any other act, shewing the election of the grantor, because in either case, *Doe v. Bancks* (a) shews that a

(a) 4 B. & A. 401.

lease containing such a proviso is not void at all events, and that a breach of it cannot be taken advantage of by a stranger, which the plaintiff here must be taken to be, for we cannot infer any privity between him and *Ustwicke*. He must be taken on these pleadings to be in lawful possession, but he may have been so as the owner of the other two third parts; in order to avoid the licence, it ought to have been shewn that *Ustwicke*, or somebody claiming under him, had done some act to determine it. That not being shewn, the replication is bad, and there must be judgment for the defendant.

Judgment for the defendant.

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MEAGER *against* SMITH.

Wednesday,
April 24th.

ASSUMPSIT for work and labour; money counts, and account stated. Plea, non-assumpsit. At the trial, before *Bolland B.*, at the *Glamorganshire* spring assizes, 1832, it appeared that the defendant resided near *Swansea*, and was the correspondent of Messrs. *Gautier* and *Dubois*, who were merchants residing at *Brest*. In the year 1831, a vessel belonging to Messrs. *Gautier* and *Dubois* arrived at *Swansea*, to be laden by the defendant. She was laden accordingly, but in quitting the

Defendant paid 500 £ —
money into
Court in an 5/12 1/2
action for work
and labour ge-
nerally, where
full particulars
were annexed
to the record.
The plaintiff
proved the work
mentioned in
the particulars
to have been
performed on
the property
of G., by the
order of M.,

and gave evidence to shew that *M.* was authorized by the defendant, and also proved acts done by the latter, which it was contended were a recognition of his own liability for the work. The Judge left to the jury, whether sufficient money had been paid; whether the defendant had ratified *M.*'s order, and to what extent? The jury having found for the defendant, declared, in answer to a question from the Judge, that *M.* had no authority to bind the defendant. The Court, *Parke J.* dubitante, refused to disturb the verdict, it not distinctly appearing that the opinion last expressed by the jury was the ground of their verdict.

Held, per *Littledale* and *Parke Js.*, that payment into Court shews only a liability for some work and labour, and is merely evidence which may be coupled with other facts, so as to shew a partial or total liability on the particular claim; and that the effect of such payment is not altered in this respect by the rule of *Trin. 1 W. 4.*, which requires a particular of demand to be annexed to the declaration.

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against
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port, she took the ground and sustained considerable damage. The vessel was repaired by the plaintiff, who now sued the defendant for such repairs. The plaintiff, in the bill of particulars annexed to the record, enumerated specifically the repairs done to the vessel, and charged the defendant with 165*l.*, and credited him with a payment of 70*l.*, the balance being 95*l.* The defendant paid 10*l.* into Court generally. In order to fix the liability upon the defendant, it was proved that a person named *Mills* had directed the repairs to be done; and evidence was given of the general connexion of *Mills* with the defendant, and of acts on the part of the defendant, which were insisted upon as shewing a recognition of his own liability in respect of the work. The learned Judge left two questions to the jury: first, whether sufficient money had been paid into Court to satisfy the balance remaining due for reasonable repairs; and, if not, secondly, whether the defendant had by his own acts ratified the order given by *Mills*, and, supposing him to have done so at all, whether the ratification extended to repairs sufficient to carry the balance beyond the amount paid into Court. The jury found a verdict for the defendant. Upon this, at the suggestion of the plaintiff's counsel, the defendant's counsel objecting, the learned Judge asked the jury, whether they considered that *Mills* had no authority to bind the defendant, or that the money paid into Court was sufficient to cover the balance due? The jury answered, that they were of opinion that *Mills* had no authority to bind the defendant. In *Easter* term 1832, *John Evans* obtained a rule to shew cause why there should not be a new trial, on the ground that the payments made were admissions of *Mills's* authority to bind the defendant;

defendant; and that, therefore, the jury had found a verdict on false grounds.

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Maule and *E. V. Williams* now shewed cause. The question was properly left to the jury. It is, however, true that if the jury had expressly found a fact inconsistent with their general verdict, the verdict could not have been supported. But it is not so if, as here, they merely find a fact which is not of itself sufficient to support the verdict. Besides, the payment into court is not conclusive evidence of the liability or authority. In cases where the declaration sets out a special contract, the defendant has express warning as to the nature of the claim, before he pays the money into court. But it could not be maintained that, if the declaration contained only a common count for goods sold and delivered, and money were paid into court, the plaintiff might establish a case by simply shewing that some goods were delivered to a third party. It will be said that, in the present case, only one claim has been shewn to exist, and that the payment must be applied to this one. But suppose work and labour had been performed for the defendant four or five years ago, to the amount of the 10*l.*, the payment might have been made with respect to that work. The plaintiff cannot use the payment as conclusive proof of the defendant's liability for any work which the plaintiff may have performed at any time or place. It might as well be treated as proof of the execution of any written special agreement which the plaintiff might allege to have been made. Besides, there are two questions here; first, whether the defendant be liable at all, and, if he be, then,

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secondly,

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secondly, to what extent he is liable. At most, the payment of the 10*l.* admits the liability to that extent only. In *Seaton v. Benedict* (a), Gaselce J. says "Payment into court generally, in *assumpsit*, admits nothing beyond the amount of the sum paid in. Where, indeed, there is a special contract, the payment into court admits that contract; but where, as in the common *indebitatus assumpsit*, the demand is made up of several distinct items, the payment admits no more than that the sum paid in is due." The plaintiff might have authorized repairs to the extent covered by the 10*l.*, or he might mean, although not actually liable, to assent to a liability to that extent; but, beyond that, to recur to his legal rights. And the jury may have answered the question in either sense. As to the payment for which the plaintiff gives credit in his particulars, the 70*l.* is not shewn to have been paid by or on behalf of the defendant; and, even if that were shewn, he might have paid it as agent of *Gautier* and *Dubois*. But in fact the giving of the credit amounts only to an admission on the part of the plaintiff.

John Evans and *Whitcombe* contra. The defendant, by his payment into Court, admits that there was something due upon the repairs; and all that the jury ought to have considered, was the amount due. Such a case as this must, since the late rule of Court (b), be treated exactly as if the declaration set forth the items contained in the bill of particulars, the latter being now a part of the record. The language used by *Tindal* C. J. in *Macarthy v. Smith* (c), shews that the parties go to

(a) 5 *Bing.* 32.(b) *Trin.* 1 *W.* 4. 2 *B. & Ad.* 788.(c) 8 *Bing.* 146.

trial upon the understanding that the complaint on the record amounts to neither more nor less than the claim made in the bill of particulars. The direction of the learned Judge is also wrong. He left it to the jury to say whether there was a liability beyond the sum paid. But there could not be a shifting liability; the defendant must have been liable to the whole demand or to no part of it. Again, the direction to the jury was such as to induce them to suppose that the defendant's liability rested simply on *Mills's* right to bind him; whereas there were independent acts shewn to have been done by the defendant which of themselves amounted to a recognition of liability.

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DENMAN C. J. This rule must be discharged. I think, substantially, all the material points were submitted to the jury. I had rather, indeed, that it had not been left as a question whether *Mills* had any authority at all to bind the defendant, because there were acts of recognition independent of any thing done by *Mills*, which tended to shew the defendant's liability. But it was very proper that the jury should be desired to consider whether that authority extended beyond the sums paid. And, if it did not go beyond that, then it became a proper question whether, and how far, the defendant by his own acts had made himself liable to the demand. These questions were all, in substance, left to the jury, and they found a verdict for the defendant. After the verdict, the jury, in answer to the question put, negatived the authority of *Mills* altogether. But it does not follow, that the jury founded their verdict upon this belief; it may have rested upon one of the other grounds. Where a verdict is returned upon a proper summing up,

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and an endeavour is made afterwards to disturb that verdict by reference to something which has operated on the minds of the jury, it must be shewn distinctly that they went upon that in giving their verdict. Here that is not the case.

LITTLEDALE J. I am of the same opinion. The payment of money into Court may, under some circumstances, amount to an admission of liability. It cannot be construed only as a purchase of peace, unless there be a stipulation of that sort at the time of the payment; which does not take place when money is merely paid into Court. In that case it amounts only to a formal admission of the defendant by his attorney, that so much is due on a claim of the nature expressed in the declaration; that is, in the present case, for work and labour. It is no more an admission of liability than if a payment had been made on a similar account before action brought. In the present case, it did not necessarily follow from the payment that this work and labour should have been performed upon the vessel. Nor did it shew a liability of any sort beyond the sum paid in. Now the liability, according to the case on behalf of the plaintiff, rests, not in any interest of the defendant in the vessel repaired, but in directions given by him. So that it becomes material to ascertain, whether the admission of liability extends to the whole, or to how much of the claim. It may appear, either that there was an authority to the extent only of the money paid, or that there was an authority to the whole extent of the work performed. The defendant might be willing to undertake a liability for a partial repair, though not for a general one. That is a question for the jury. It is, however,

however, urged on the part of the plaintiff that, since the new rule, the case must be treated as if the particulars of demand were a part of the declaration; for instance, as if the declaration had alleged certain work performed on the bowsprit, and so on. I cannot agree to this, so far as regards the effect of payment of money into Court. It might be that the full particulars were not originally annexed to the record, and in that case, there being only a claim for work and labour in the first instance, the defendant might choose to admit that he owed 10*l.* for some work and labour, and pay that sum into Court, and afterwards might demand full particulars, which, when delivered, might contain what he considered new causes of action. For this reason, I think it safer to adhere to the rule, that the payment of money into Court does not bind the defendant to admit the particulars of the demand, and that the particulars are not necessarily connected with the payment. I am of opinion, therefore, that the question was properly left to the jury. The liability would be established by *Mills* having authority, or, in default of that, by the defendant ratifying the engagement; and, if the liability existed, the question would be, how far it extended.

PARKE J. I am not satisfied that the jury have found their verdict on the right ground; and, if the matter depended upon me, I should send the case to a second trial. The jury, in answer to the question put to them after the verdict, negatived *Mills's* authority, and from the mode in which the question was put, and their answer to it, I should infer that they founded their verdict altogether upon *Mills's* want of authority; whereas it is clear, that he might have had none, and yet the

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defendant have been liable to their demand. Under these circumstances, I should have wished the case to have gone to a second trial, that the jury might have decided upon both questions; first, whether *Mills* had authority to bind the defendant; and secondly, in default of that authority, whether the defendant had rendered himself liable, by his own acts, to a greater amount than the money paid into Court. With regard to the effect of payment of money into Court, there is no doubt, but that if such a payment is made on a count alleging a special contract, it operates as an admission of that contract: if on a general indebitatus count for work and labour, or the like, on which the plaintiff might recover for one or more distinct contracts, it operates as an admission of a liability to that amount, on some one or more of such contracts: its effect, in both cases, is the same as if a payment had been made by the defendant to the plaintiff of the like sum before action brought. But in that case, supposing it had clearly appeared in evidence, that there was in reality one entire indivisible contract in question between the parties, to which the payment must necessarily be referred, such payment would have operated as an admission of that contract, leaving it open to the defendant to make out his defence as to the unsatisfied part of it: and, in like manner, the payment into Court on a general indebitatus count for several things, may, I conceive, in some cases, coupled with the evidence, have the effect of an admission of a particular contract. I do not mean to say, that the payment would have had that effect in the present case: but as the only transaction in question between the parties was, the demand for the repairs of the ship on one particular occasion, the payment of money into
Court

Court would certainly have had the effect of an admission of liability to *a part* of that demand: the defendant being at liberty to contend that he had not made himself liable beyond that amount. I cannot help thinking, that the jury have proceeded on a wrong ground; and that they have not taken into consideration at all the acts of the defendant as tending to establish his liability, but that they have enquired only whether *Mills* was the agent of the defendant; and assumed that, unless he were, the defendant would not be liable. On that account a new trial would have been more satisfactory to my mind.

Rule discharged.

EVERETT *against* YOEUELLS.

Wednesday,
April 24th.

THIS was an action of assumpsit, on a warranty of sheep, tried before *Vaughan* B. and a special jury, at the *Norfolk* spring assizes, 1832. The verdict was for the defendant. *Storks* Serjt., in *Easter* term 1832, (*April* 19th), moved for a rule to shew cause why there should not be a new trial (*a*); first, on the ground that the verdict was against evidence; and secondly, on affidavits. By the first of these, it appeared that the trial began in the afternoon of *Friday*, the 23d of *March*, and occupied the rest of that and all the following day; that on *Saturday* evening, at eight o'clock, the jury retired from the box to consider their verdict,

The delivery of food to a juryman, after the jury were shut up to consider of their verdict, is no ground for setting the verdict aside, if it do not appear that such refreshment was supplied by a party to the cause, or that it was delivered to a juryman, whose holding out decided the event.

admissible as to matters which pass openly in Court, but where there is a Judge's report on the same points, that is conclusive.

Affidavits of juryman are

4 B. & C. 546.

(a) Before Lord Tenterden C. J., *Littledale*, *Parke*, and *Patteson* Js.

and,

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and, not agreeing, were shut up till the following morning; and that about three hours after they were shut up, a servant of *J. A.*, Esq., the foreman, conveyed a sandwich to him by stratagem. The second affidavit (by the plaintiff's attorney), stated the deponent's information and belief, that about ten o'clock on the *Sunday* morning, the jury had an interview with the Judge, who, then observed to them on the subject of their verdict, "that concession ought to be made by the minority to the majority;" shortly after which, they agreed to find for the defendant; and the deponent said he was informed and believed, that in consequence of the Judge's explanation, and of exhaustion for want of victuals, three jurymen whom he named, (not including *J. A.*) were induced, though against their inclination, to yield up their own opinion and agree with the rest of the jury to find for the defendant. *Storks* Serjt. also proposed to put in affidavits of two of the jurymen to a similar effect with the last. [Lord *Tenterden* C. J. I doubt whether these are admissible.] They do not come within the decided cases, where jurymen have offered to allege their own misconduct; and a ground is laid for receiving them, if the Court be of opinion that the verdict was against evidence.

LORD TENTERDEN C. J. The delivery of food to the foreman might be ground for imposing a fine, but it is not a reason for setting aside the verdict. It does not appear that the food was supplied by a party to the cause, nor on which side the jurymen who received it, was at the time; that one jurymen only held out; or that the delivery of refreshment to the one who held out turned the event of the trial. Unless the

affidavits

affidavits would shew that this refreshment had the effect of carrying the verdict, they would not support the rule (a).

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LITTLEDALE J. concurred.

PARKE J. The officer who attended the jury may be punishable for neglect; but it would be a fearful thing if verdicts could be set aside on such grounds as this.

PATTESON J. concurred.

The rule, therefore, as to this point, was refused; but a rule nisi was granted on two of the grounds stated; one of them being the alleged misdirection of the learned Judge, which was said to have influenced a part of the jury: — Lord *Tenterden* at the same time observing that the statements on this point might, perhaps, go the length of shewing that the verdict was not that of the whole jury; but that this would be a very dangerous ground to act upon in setting aside a verdict.

The report of the learned Judge was now read; by which it appeared that the expressions he had used were different from those ascribed to him. *Kelly* and *Austin*, in support of the rule, were stopped by the Court.

F. Pollock and *Storks* Serjt., *contra*, adverted to the affidavits of the two jurymen; contending (which was denied on the other side) that the Court, on the former occasion, had permitted them to be filed. [*Parke* J. We cannot hear these affidavits.] A jurymen is competent

(a) See *Co. Litt.* 227 b. *Dunc. Trials per Pais*, 8th edit. 248—252.

1833. to state on affidavit what passes publicly in presence of the Court.

EVERETT
against
YOUVELLS.

Per Curiam. (a) We cannot receive statements from the jury to shew on what grounds they acted. Affidavits of jurymen may be admissible, to shew what questions they put to the judge (though that would come better from any other source), or they may be used to supply the defect of notes by counsel: but when we have the Judge's own statement, that is a better authority.

The Court, therefore, being of opinion that on the report there appeared no misdirection, nor any ground for saying that this was not the verdict of the whole jury; and that on the other point there was no reason for disturbing the verdict, the rule was

Discharged.

(a) *Denman C. J., Littledale and Parke Js.*

1833.

The KING *against* The Justices of the West Riding of YORKSHIRE.

Thursday,
April 25th.

(In the Matter of BOWER.)

A RULE nisi had been obtained for a mandamus to the justices of the West Riding to enter continuances upon, and hear, the appeal of *Joshua Bower* against certain orders of two justices for diverting certain public footways in the township of *Middleton*, in the parish of *Rothwell*, in the said West Riding. The orders were three in number, all dated the 28th of *May* 1832; and *Bower*, on the 25th of *June* 1832, gave notices of appeal against each of the orders, and, among other objections, the following was stated in every notice. "Because, if the said order should stand, and the said road be stopped up, the appellant and his tenants, occupiers of a certain farm, lands, &c., near adjoining the said road, and who have heretofore used, and have a right to use, the same, and also other persons, and the public, would be put to great inconvenience." The notices did not otherwise state that the appellant was aggrieved by the orders.

In a notice of appeal against an order for stopping up a footway (under 55 G. 3. c. 68. s. 3.) it sufficiently appears that the appellant is a party aggrieved, if it be stated that he and his tenants, occupiers of a farm and lands near the said way, and who have heretofore used, and have a right to use it, and also other persons, and the public, will be put to great inconvenience.

The statute requires "ten days' notice" of an appeal to the sessions

against such order. By a rule of the West Riding sessions, in cases of appeal "not otherwise directed by law," ten days' notice is to be given, exclusive of the day of notice and first day of the sessions: Held, that the statute meant ten days' notice, one inclusive and the other exclusive; that the sessions rule did not apply to this case, or if it were intended to do so, this Court would use its discretionary power of controlling the practice.

The appellant gave notices of appeal against three orders, all of the same date; he attended the clerk of the peace to enter them, and the entry was in the following form. "A., appellant against an order of B. and C. Esquires, dated, &c. for stopping up footways in," &c. He paid the fee as upon one appeal. At the sessions, the appellant's counsel being called upon by the other side to elect which appeal he would proceed with, proved his notices upon one, which was dismissed on a supposed defect of notice, and the order confirmed, as were the two others, nothing being said of the appeals against these, to which the same objections would have applied. On motion for a mandamus to enter continuances and hear the appeals, it appearing that the preliminary objection taken was unfounded, and that the appellant had in reality intended to enter his appeal against all the orders, this Court made the rule absolute as to all three.

The 4 Bac. 222.

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The next quarter sessions for the West Riding were held on the 5th of *July*; on which day the appellant's attorney entered an appeal with the deputy clerk of the peace, in the following form — “ *Joshua Bower*, appellant against an order of *J. A.* and *J. I.* Esqrs. for stopping up footways in the township of *Middleton*, dated 28th *May* 1832.” And he paid the fee which is usual for entering one appeal, the deputy clerk of the peace not being apprised at the time that more than one order was in question (a). The three orders being, on the same day, returned to the sessions, the respondents' counsel called on the counsel for the appellants to elect which case he would enter upon; and he proceeded to prove his notices of appeal against the order which stood second. An objection was taken, but over-ruled, that the notice did not state the appellant to be a party aggrieved. It was then objected that there had not been ten days' notice of appeal according to the rules of practice of these sessions; one of which is as follows: — “ Appeals. In all cases of appeals not otherwise directed by law, ten days' notice in writing shall be given by the party appealing, his, her, or their attorney or solicitor, exclusive of the day of service and the first day of the sessions or the adjournment to which the appeal is intended to be made.” The Court held this objection valid, and dismissed the appeal and confirmed the order. They also confirmed the other two orders, no appeal against them being entered upon, nor any evidence offered of service of notice as to them.

(a) The attorney for the appellant swore that he served the notices of appeal, and “ as such attorney did duly enter the said appeal at the clerk of the peace's office.”

Blackburne

Blackburne and *Dundas* now shewed cause. This is a notice given under the statute 55 G. 3. c. 68. s. 3. which enacts that in case of a footway being stopped up by order of justices, it shall be lawful for "any person injured or aggrieved by any such order or proceeding," to appeal to the justices at the quarter sessions next after the expiration of four weeks from the first publication of notice of such order, "upon giving ten days' notice in writing of such appeal to the surveyor of the highways," &c.; and the said court of quarter sessions is thereby authorised and empowered to hear and finally determine such appeal. First, the fact of the appellant being a party aggrieved, is not shewn with the certainty which appears to be requisite on a comparison of the cases, *Rex v. The Justices of Essex* (a), *Rex v. The Justices of the West Riding* (b), *Rex v. The Inhabitants of Blackawton* (c). Secondly, there was not ten days' notice according to the construction which the sessions have determined should be put upon those words in the statute. By the expressions there used it was left open to them to decide whether the ten days should be exclusive or inclusive, and they, to prevent disputes, have established a rule, which ought to have been observed. Thirdly, one appeal only was entered or proceeded upon; on two others the orders were confirmed, and as to these at least there is no ground for the application.

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Follett contra. It is clearly shewn by the notice, though not stated in terms, that the appellant is aggrieved; on this point, therefore, the language of the

(a) 5 B. & C. 431.

(b) 7 B. & C. 678.

(c) 10 B. & C. 792.

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Court in *Rex v. The Justices of the West Riding* (a), and *Rex v. Blackawton* (b), is expressly in his favour. [Denman C. J. We do not think any thing of that objection.] As to the second point, even the rule of the sessions only requires ten days' notice, exclusive of the day of service and first day of the sessions, in those cases *where it is not otherwise directed by law*. Here the statute requires ten days' notice; the proper construction of which, according to the general rules of law, is, that one day shall be reckoned exclusively and one inclusively. That mode of construction is adopted in the new rules of Court, *Hil. 2 W. 4. (c)*, and was recognized in some degree in *Pellew v. The Hundred of Wonford* (d), as applicable where the computation is made from an act done by the party against whom the time runs. That is so here. If the sessions intended, by their rule of practice, to require ten days' notice exclusively, where a statute only prescribes "*ten days' notice*," the question then will be, whether the justices ought to have acted upon such a rule, and if not, this Court will exercise its discretionary power of controlling their practice, as in *Rex v. The Justices of Wilts* (e), and *Rex v. The Justices of Lancashire* (g). As to the third objection, it is not denied that there were notices of appeal against three orders: the appellant was called upon in Court to elect on which appeal he would proceed; and when one had been dismissed in the manner stated, it became useless to proceed with the others.

DENMAN C. J. I am of opinion, that this rule must be made absolute. As to the last objection, the omis-

(a) 7 B. & C. 678.

(c) 3 B. & Ad. 393.

(e) 10 East, 404.

(b) 10 B. & C. 792.

(d) 9 B. & C. 134.

(g) 7 B. & C. 691.

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sion to proceed on the appeal to the first and third orders is explained by the decision of the Justices on the second : and it appears sufficiently on the affidavits that the attorney meant to tender his appeals to be entered against the three orders. With respect to the second point, the rule of practice at the sessions is inapplicable here ; for it applies only to “ cases of appeals not otherwise directed by law.” Here it is directed by the statute that there shall be ten days’ notice of appeal to the sessions, and that, according to the practice of the superior courts in other cases where such notice is required, must be taken to mean that one day shall be reckoned inclusively and one exclusively. It was not competent to the sessions to impose such a rule as is here contended for ; if they meant it to be applicable to this statute, they have misconstrued the clause in question ; but it seems to me that they have merely left the act as they found it. On the first point their decision was right.

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LITTLEDALE J. The words “ ten days’ notice” in 55 G. 3. c. 68. s. 3. must be construed as such words are in other cases, and are not affected by the rule of the sessions. It does in this case sufficiently appear by the words of the notice that the appellant is a party aggrieved ; the allegation of inconvenience to the public in general, is an addition which make no difference.

PARKE J. If the time of notice was already fixed by law, the rule of sessions does not interfere with it ; and if the rule were intended to have that effect, this Court might exercise a control over it. The act

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says there shall be "ten days' notice" of appeal to the sessions, and the Court cannot adopt a better rule for construing the words than that which has been already adopted in similar cases. If the legislature had intended a different practice to be followed in this instance, they would probably have said "ten clear days." With respect to the appeals against the several orders, it seems that the intention of the appellant was to enter his appeals against all the orders. If that was not done, there is nothing to shew that it was his fault. On the first point, I think the decision of the justices was right.

Rule absolute.

Thursday,
April 25th.

Ex parte BATTINE, LL.D.

8 99.5
A pension during his Majesty's pleasure, granted by order in council on petition for past services as advocate of the admiralty, and charged on the navy estimates, may be appropriated, under the insolvent act 7 G. 4. c. 57. s. 29., with the consent of the lords of the admiralty, for payment of creditors.

Quære,
Whether this

Court could have granted a prohibition to the insolvent debtors' court against proceeding upon an order for such appropriation, if it had not been warranted by the statute?

A RULE had been obtained, calling upon the Commissioners of the Insolvent Debtors' Court to shew cause why a prohibition should not issue to the said court against proceeding on an order made by them on the 17th of November 1831, for the assignment of part of a certain pension of 200*l.* per annum granted to *William Battine*, LL.D. by the Prince Regent in council on the 8th of May 1812, and held by the said *William Battine* during His Majesty's pleasure; and from making any order, or taking any proceedings for assigning any part of such pension. The material facts stated on affidavit for and against the rule were as follows: —

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In *March* 1812, the Prince Regent, by order in council, referred to a committee of the privy council a report from the Lords Commissioners of the Admiralty upon a certain memorial of the above mentioned Dr. *Battine*, late His Majesty's advocate general in his office of Admiralty. The memorial stated, that Dr. *Battine* had been superseded in his office, and prayed some provision on retirement in remuneration of his past services during twenty years. The Lords of the Admiralty had in their report submitted, for reasons assigned by them, whether it would be proper to grant any pension, but recommended that such pension, if granted, should not exceed 200*l.* per annum. Upon this report the committee of privy council, on the 8th of *May* 1812, represented to the Prince Regent in council that it might be advisable to grant Dr. *Battine*, in the name and on the behalf of His Majesty, a pension of 200*l.* per annum to commence from the day he ceased to hold his office, and to be charged on the ordinary estimates of the navy; and on the same 8th of *May* the Prince Regent, by and with the advice of the privy council, approved of the proposal made by the committee, and ordered that the said pension should be granted, to commence and to be charged as recommended by the committee; and the Lords of the Admiralty were, by that order, required to give the necessary directions.

On the 17th of *November* 1831, Dr. *Battine* was discharged from custody under the Insolvent Debtors' act, 7 G. 4. c. 57. and executed the usual warrant of attorney. Before his discharge it was determined by the Court that the annual sum of 180*l.*, part of the said pension, should be paid to the assignees of the

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insolvent's estate, to be applied in discharge of the debts till that Court should further order; and they communicated to the Lords of the Admiralty their intention to make an order to that effect, if, upon receipt of their communication, the said Lords should consent thereto in writing, according to the statute. The Lords of the Admiralty consented. A similar communication was made to the commissioners of the navy, and assented to by them.

In answer to an enquiry made by the clerk of the Insolvent Debtors' Court (with reference to the present proceeding) Mr. *Barrow*, the Secretary to the Admiralty, stated the nature of Dr. *Battine's* pension as follows: —

“ Dr. *Battine's* pension of 200*l.* per annum, enjoyed under this department, is a naval pension for civil services, namely, as advocate of the admiralty. It is charged, like all other civil naval pensions, on the ordinary estimate of the navy, is paid by the treasurer of the navy by warrant from this department; and differs in no respect from any other naval pension for civil services, except in its amount being larger than is authorized by the act 50 G. 3. c. 117.; which required that it should be sanctioned by His Majesty's order in council.”

Dr. *Battine* denied that the pension was one which the Insolvent Debtors' Court could legally appropriate in the manner directed by 7 G. 4. c. 57. s. 29. (a)

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(a) 7 G. 4. c. 57. s. 29. “ Provided always, and be it further enacted, that nothing in this act contained shall extend to entitle the assignee or assignees of the estate and effects of any such prisoner, being or having been an officer of the army or navy, or an officer or clerk, or otherwise employed or engaged in the service of His Majesty, in the customs or excise, or any civil office, or other department whatsoever, or being or having been in the naval or military service of the *East India* Company, or an officer or clerk, or otherwise employed or engaged in the service of the Court

The *Solicitor-General* and *F. Pollock* now shewed cause. Even assuming that the Insolvent Court has acted erroneously, this Court ought not to interfere in the manner proposed. The Court below may be in error, and their proceeding void; but that is not of itself ground for a prohibition. [*Parke J.* Not if they had authority to decide the point as to the pension being assignable. But if they had not, this Court may control them.] The same reasoning would have been applicable in *Ex parte Cowan (a)*, where, however, the Court did not decide that a prohibition lay to the *Lord Chancellor* sitting in bankruptcy. If the present case is not within the proviso made by sect. 29. of the act, the pension is wholly subject to the authority of the Court below; and there is no other excep-

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Court of Directors of the said company, or being otherwise in the enjoyment of any pension whatever under any department of His Majesty's government, or from the said Court of Directors, to the pay, half pay, salary, emoluments, or pension of any such prisoner, for the purposes of this act: Provided always nevertheless, that it shall be lawful for the said Court to order such portion of the pay, half pay, &c. of any such prisoner, as on communication from the said Court to the Secretary at War, or the Lords Commissioners of the Admiralty, or the Commissioners of the Customs or Excise, or the chief officer of the department to which such prisoner may belong or have belonged, under which such pay, half pay, &c. may be enjoyed by such prisoner, or the said Court of Directors, he or they may respectively, under his or their hands, or under the hand of his or their chief secretary, or other chief officer for the time being, consent to in writing, to be paid to such assignee or assignees, in order that the same may be applied in payment of the debts of such prisoner; and such order and consent being lodged in the office of the paymaster of His Majesty's forces, &c. or of any other officer or person appointed to pay, or payng, any such pay, half pay, &c. such portion of the said pay, half pay, &c. as shall be specified in such order and consent, shall be paid to the said assignee or assignees, until the said Court shall make order to the contrary."

(a) 3 B. & A. 123.

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tion in the act to limit it. [*Parke J.* That is so, if the clause operates merely as an exception to a general power which the Commissioners possess under the act; but, if the act gives them only a special authority over pensions, while it confers a general power over other kinds of property, may we not be entitled to restrain them if they exceed the limited authority?] It is for them to determine whether the particular instance falls within their jurisdiction; and if they are wrong, it is not a ground of prohibition, as if they had taken cognizance of a subject matter altogether out of their province. The eleventh section of the act gives a general power over the insolvent's estate; the twenty-ninth restrains that power; but it is for the Commissioners to interpret the restricting clause. Unless they are to do so, how are they to make the orders which that section requires? and it cannot be said that as often as they make an order not warranted by the act, the jurisdiction is exceeded. This order has been made, subject to the assent of the admiralty, as directed by sect. 29. If the section did not apply, the pension was disposable for the benefit of the creditors without such assent. Besides, the proceeding was taken by the Court with the consent of the party himself, for his own benefit as well as for the promotion of justice; and is, therefore, valid, even if there was, strictly, no jurisdiction to make the order.

Follett, contra. A mere pension during pleasure, as this is, would not pass by the general assignment under sect. 11. Neither is it reached by the proviso in sect. 29. That applies only to pensions held under any department of His Majesty's government. This is not

so held, but is merely an allowance granted at the will of the Prince Regent on the petition of the party. There is no doubt that if the Court below was acting within its jurisdiction, a prohibition would not lie, but here no jurisdiction exists, unless it be given by the twenty-ninth section. The nature of the pension, and the mode in which it is granted, render that section inapplicable. [*Parke J.* You say this is not a pension under any department of His Majesty's government; but the Lords of the Admiralty are to execute the order in council for the payment.] Still, the question is, whether this be a pension held under the Admiralty; being granted by order in council, merely at the royal pleasure. It is a matter of favour only; and differs altogether from pensions for services, held by vote of parliament, pursuant to the several acts which regulate such pensions. For instance, in 50 G. 3. c. 117. ss. 2. and 3., the former kind of pension is expressly distinguished from the latter. It is not subject to the same regulations and deductions. The pension voted by parliament under that act is in the nature of a continued pay; it is fixed by reference to the salary which the party enjoyed in his office, and to the length of his service; and where granted in the offices of the Secretary at War, Master-general of the Ordnance, or Lords of the Admiralty, it is returned with the estimates of that department. But the pension granted by the King in council has nothing analogous to pay. [*Parke J.* Would not sect. 11. pass every kind of pension, but for sect. 29. ?] It would not pass an officer's half pay, *Flarty v. Odium* (a). [*Parke J.* That was under a differently framed act. Here it is

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argued, from the restraining section, that whatever is not within that, was meant to pass by sect. 11.] It could not have that effect if the pension did not come within the descriptions of property enumerated in sect. 11. As to the supposed assent of the insolvent, if he did what was required by the Insolvent Court as a condition of his discharge, that is no bar to the present application, if the matter was wholly out of the jurisdiction of that Court.

DENMAN C. J. Without touching upon the very important general question, whether or not a prohibition would lie to the Insolvent Court against entering upon a case of this kind under other circumstances, it is sufficient to say here, that I think this pension is clearly within the twenty-ninth section of the act. The eleventh section, *primâ facie*, would pass all those matters which are afterwards made the subject of exception in sect. 29. Then, by that section, a proviso is introduced, that nothing in that act shall extend to entitle the assignees of the estate of any such prisoner, "being, or having been, an officer of the army or navy, or an officer or clerk, or otherwise employed or engaged, in the service of His Majesty, in the customs or excise, or any civil office or other department whatsoever, or being otherwise in the enjoyment of any pension whatever under any department of His Majesty's government, to the pay, half-pay, salary, emoluments, or pension of any such prisoner, for the purposes of this act:" but, nevertheless, that a part of such pay or pension may be appropriated to the purposes of the act, by arrangement made with the heads of the department, as is directed in that clause. I think, in this case, there is no doubt that the insolvent

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was a person who had been employed in the service of His Majesty in a civil office, and was in the enjoyment of a pension under a department of His Majesty's government. The Privy Council recommended the grant to the Prince Regent, to commence from the day when Dr. *Battine* ceased to hold his office, and to be charged on the ordinary estimates of the navy. The order in council passed accordingly, and the Lords of the Admiralty were required to give the necessary directions. Here, then, is a pension, held under such a department, and by such a person, as are expressly named in the twenty-ninth section. Giving that section a reasonable and ordinary construction, I think it is clear that the pension was such as might, with the consent which the act required, be assigned for the benefit of the creditors.

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LITTLEDALE J. I am of the same opinion. The insolvent had certainly been a person employed in a civil office in the naval department of His Majesty's government, and enjoyed a pension under that department. The commissioners, therefore, might properly make the order for paying over a part of it, with the assent of the Lords of the Admiralty. As to the power of this Court to grant a prohibition to the Insolvent Debtors' Court, it is not necessary to express any opinion.

PARKE J. It is unnecessary to say whether or not such a pension as this would pass under the general assignment directed by section 11.; I think it is clearly within the proviso of section 29., as granted to a person who had been in His Majesty's service in a civil office, and held under, and included in the estimates of a department of His Majesty's government.

Rule discharged with costs.

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Thursday,
April 25th.

The KING *against* DONNISON and Another.

28-57
v. 423

The rule established at nisi prius in prosecutions for libel in a newspaper, viz. that after production of the stamp-office affidavit, a paper corresponding with it in title, printer's and publisher's name, and place of publication, may be put in and read as published by the parties therein named, without other proof on this point, applies equally on motions for criminal information.

670. J. 204.

A RULE nisi had been obtained for a criminal information against these parties for misdemeanors in printing and publishing certain scandalous libels. The rule was drawn up on reading the affidavits of the Earl of *Lonsdale* and other persons, and a paper partly written and partly printed, thereto annexed (a), and the several printed papers thereby referred to. Upon cause being shewn, it appeared that some newspapers, entitled "*The Whitehaven Herald*," published at *Whitehaven*, and bearing the names of the printer and proprietor, had been put in with (though not annexed to) the affidavits; but the latter consisted merely of the usual copy of the stamp office affidavit (that the defendants were the printer and proprietor of a newspaper called, &c. and intended to be published at *Whitchaven*), and depositions by the Earl of *Lonsdale* and other persons, denying that the Earl had been guilty of particular acts of misconduct; as peculation, breach of certain trusts, entertaining ruffians at his table, &c. They did not in any more direct manner refer to the newspapers or any part of them, nor did they charge the defendants or any other person with having asserted or published the matters stated to be untrue; but the newspapers did, in fact, contain such imputations upon the Earl.

Armstrong now shewed cause. The rule must be discharged, for the affidavits do not, either directly or

(a) The stamp office affidavit.

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by reference, impute any offence to the parties against whom this motion is made. The rule states that the printed papers are referred to by the affidavits, but that proves not to be the case; they make no reference to any paper or passage. The act 38, G. 3. c. 78. does not meet this objection; that merely gives facilities in proving who are the printer and proprietor. [*Follett*, *amicus curiæ*, mentioned the case of *Rex v. Featherstone*, editor of *The Western Times* newspaper, in Trinity term 1830, where the present objection was taken, and the Court enlarged the rule, in order that supplemental affidavits might be made (a).]

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2. 10. 38. 50
2. 10. 38. 52

Sir *James Scarlett* and *F. Pollock* contra. On applying for the rule, the stamp office affidavit was produced, and newspapers were put in, corresponding with it in title, place of publication, and printer's and publisher's names. That by 38 G. 3. c. 78. s. 11., was sufficient proof that the papers in question had been printed and published by the defendants; and the rule is drawn up "on reading the printed papers," which shews that the libellous matter was read to the Court on moving for the rule.

Per Curiam (b). As soon as the stamp office affidavit is proved, the statute enables the prosecutor to put in a newspaper corresponding with it, and to use such paper as evidence against the defendant (c). That is the rule at nisi prius, and by parity of reasoning it

(a) In the affidavits afterwards made, one deponent stated that he had read the libellous matter in a certain paper, &c. and another expressed his belief that it referred to the party complaining.

(b) *Denman C. J.*, *Littledale* and *Parke J.*

(c) *Mayne v. Fletcher*, 9 B. & C. 382.

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should be so here. If no other cause is shewn, the rule must be absolute.

Rule absolute (a).

(a) But quære, (although the newspapers were properly before the Court as evidence against the defendants), whether the affidavits ought not to have specifically pointed out the libellous matter complained of, and which the prosecutor's affidavits were intended to contradict.

Friday,
April 26th.

ELIZA KELLY *against* JOHN PARTINGTON.

2d. - 646 A master in giving the character of his late servant to a person intending to take her, charged her with theft; and in support of that charge, stated, that she had borrowed money when she came into his service, and repaid it before she received any wages. In reply to an enquiry made afterwards by a relation of the servant, he admitted that the time when he paid the wages was entered in a book, which he produced, but refused to state what the time was; and on the same party remonstrating, and observing that the servant, in consequence of her loss of character, might have gone upon the town, he answered, "What is that to us?"

CASE for words imputing theft, with an averment that one *James Stenning*, in consequence of the words, refused to take the plaintiff as a shop-woman. At the trial before *Patteson J.* at the sittings in *Middlesex* during this term, it appeared that *Stenning*, who was going to take the plaintiff into his service, enquired her character of the defendant, to whom she had been shop-woman; and the defendant, on that occasion, charged her with having secreted money taken from his till, and also stated that when she came into his service she borrowed half a sovereign of her mother, and that before she had been there two months, and before she received any wages, she paid her mother the money, and made her a present of a sovereign. The plaintiff's brother-in-law deposed that he afterwards called upon the defendant for an explanation of the words, when he repeated the same charges. The witness, with reference to the latter statement, observed that the defendant, no doubt, made entries in some book, of the times at which

Held, that this conduct was evidence to go to the jury (though slight), that the communication to the intended master was made maliciously.

5 Bac. 198.

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he paid his servants' wages, and that on reference to it he would probably find that he was mistaken in what he had asserted. The defendant then went to his desk, took out a memorandum book, and looked at it; after which he turned to the witness, and asked, "Do you know when she received her wages?" the witness answered "No;" but he would go by the defendant's account, as that was likely to be correct. The defendant then said "If you do not know, I am not going to tell you," and put the book into the desk again. The witness upon this made some allusion to intended proceedings at law, and said he considered the case of theft as trumped up; to which the defendant made no answer, but "grinned" in a contemptuous manner at the witness; and upon his remonstrating, and observing that if the plaintiff had not had friends, she might have gone upon the town, the defendant said (speaking of himself and his wife) "What is that to us?" Evidence was then given in contradiction of the defendant's statement as to the time when the plaintiff repaid the half-sovereign. Upon this case, Sir *James Scarlett*, for the defendant, submitted that there was no ground of action, inasmuch as the words spoken to *Stenning* were a privileged communication to a person enquiring the character of a servant; and those to the brother-in-law were spoken to an agent of the plaintiff by way of explanation, which he had called for on her behalf; and there was no proof of express malice. *Patteson J.* refused to nonsuit, but reserved leave to move; and the defendant having given some evidence to shew grounds of suspicion on his part, a verdict was found for the plaintiff, damages one shilling.

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Sir *James Scarlett* now moved to enter a nonsuit, and contended that, on the above facts, there was no evidence to go to the jury of express malice. In *Child v. Affleck*(a), the case of malice was much stronger; but the plaintiff was nonsuited, and this Court held the direction right.

DENMAN C. J. Where it is clear that the words complained of are nothing more than a communication from one master to another, informing him of the character of a servant, the case certainly ought not to go to a jury. But where there are other circumstances from which malice may be inferred, the question is for them to decide. Here there were such circumstances, though very slight; namely, the refusal to point out an entry in a book, when that became the means of proving or disproving a charge which the defendant had made; and the answer, "What is that to us?" when it was suggested that the plaintiff might have gone upon the town. I think, therefore, we ought not to grant a rule.

LITTLEDALE J. concurred.

PARKE J. There was a slight case to go to the jury, and no more.

Rule refused.

(a) 9 B. & C. 403.

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The KING *against* The Inhabitants of
TADCASTER.

Saturday,
April 27th.

ON appeal against an order of two justices, whereby *Jane Silversides*, and her five children, were removed from the township of *Leeds* in the county of *York*, to the parish, township, or place of *Tadcaster*, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The appellants admitted that *William Silversides*, the late husband of the pauper *Jane Silversides*, gained a settlement by apprenticeship in the township of *Tadcaster*, and the respondents admitted that he afterwards went to reside in the township of *Leeds*, and in *November* 1827 took a dwelling-house, there situate, as tenant to one *W. Wheelwright*, and occupied the same until *September* 1830, at the yearly rent of 6*l.* 10*s.*, which rent was duly paid for all that period; that in *May* 1828, *William Silversides* also took a building used as a shed, where he carried on his business of a bricklayer and mason, situate in the said township of *Leeds*, as tenant to one *Robert Myres*, and occupied the same until *September* 1830, at the yearly rent of 5*l.*, which rent was also duly paid for all that period. The dwelling-house was wholly separated and distinct from, and unconnected with, the other building, there being a separate and distinct tenement between them, belonging to and occupied by another person. The question for the opinion of the Court was, whether the pauper gained a settlement in *Leeds* by renting a tenement under 6 G. 4. c. 57.

A pauper in *1827* — *1828*
Nov. 1827 took
a dwelling
house of *A.*,
at an annual
rent of 6*l.* 10*s.*
In *May* 1828
he took of
B. a building
used as a shed,
situate in the
same parish,
but entirely
separated and
distinct from
the dwelling-
house, at an
annual rent of
5*l.* He occu-
pied both, and
duly paid the
rents, until
September
1830: Held,
that he thereby
gained a settle-
ment by rent-
ing a tenement
under the stat.
6 G. 4. c. 57.

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Milner and *Baines* in support of the order of sessions. The pauper gained no settlement in *Leeds*. The settlement by renting a tenement arises by implication from the statute 13 & 14 *Car. 2. c. 12.*, which authorizes two justices of peace to remove any poor person "coming so to settle, as aforesaid, in any tenement under the yearly value of 10*l.*," within forty days after he shall so come to settle; and in the reign of *George* the first it was held in *South Sydenham v. Lamerton* (a), that the taking of an entire tenement of 10*l.* per annum conferred a settlement though it lay in two parishes, but that two distinct tenements making together 10*l.* per annum in different parishes would not. That decision was virtually overruled in *Rex v. Newnham* (b), where it was decided that a settlement was gained by renting a house at a rent of 3*l.* per annum of one landlord, and land at the rent of 8*l.* of another landlord. Such was the state of the law before the passing of 59 *G. 3. c. 50.*, which enacts "that no person shall acquire a settlement in any parish by reason of his dwelling for forty days in any tenement rented by him, unless such tenement shall consist of a house or building being a separate and distinct dwelling-house or building, or of land within such parish, or of both, bonâ fide hired by him, at and for the sum of 10*l.* a year at the least, for the term of one whole year; nor unless such house or building shall be held and such land occupied, and the rent for the same actually paid for the term of one whole year at the least, by the person hiring the same." Now these words seem to import, that there should be one tenement, taken at one time. It was de-

(a) *Str.* 57.(b) *Burr. S. C.* 756.

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cided, however, in *Rex v. North Collingham (a)*, and *Rex v. Stow (b)*, that the tenement required by this statute might consist of different parcels hired at different times. The act 59 G. 3. c. 50. was repealed by 6 G. 4. c. 57., which enacts, that “no person shall acquire a settlement by reason of settling upon, renting, or paying parochial rates for any tenement not being his or her own property, unless such tenement shall consist of a separate and distinct dwelling-house or building, or of land, or of both, bonâ fide rented by such person in such parish &c., at and for the sum of 10*l.* a year at the least, for the term of one whole year; nor unless such house or building, or land, shall be occupied *under such yearly hiring*, and the rent for the same to the amount of 10*l.* actually paid, for the term of one whole year at the least; provided always that it shall not be necessary to prove the actual value of such tenement.” This latter statute differs from the former, inasmuch as it requires the house, or building, or land to be occupied, not by *the party hiring the same*, but *under such yearly hiring*. That expression imports, that the occupation should be under *one*, not several contracts of hiring. This case is not within the act, because the two buildings were not hired at the same time; and the words of an act of parliament are to be construed in their grammatical and natural sense, unless it appears clearly from the context that they were intended to be used in some other sense: per *Parke J.*, in *Rex v. Ditchet (c)*.

But, secondly, in order to satisfy this statute, the tenement must consist of a dwelling-house, or building, or of land, or of both. It will be said, that the

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(a) 1 B. & C. 578.

(b) 4 B. & C. 87.

(c) 9 B. & C. 186.

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ants of
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word *both* applies to any two of the three things previously mentioned, and consequently that the tenement may consist of a dwelling-house and building; but as the word *building* necessarily includes in it a dwelling-house, the statute may, therefore, be read as if it had said “a separate and distinct building, or land, or both;” and, if so, then two separate and distinct buildings would not satisfy the meaning of the statute.

Cresswell contra. The dwelling-house and shed constituted a tenement within the meaning of 6 G. 4. c. 57., which, in terms, requires that it should consist of a dwelling-house, or building, or land, or both. No sufficient reason can be assigned why it should not consist of a dwelling-house and building as well as of a dwelling-house and land, or of a building and land. The argument on the other side assumes that only two things are specifically mentioned, to which the word *both* can refer; a dwelling-house and building being one, and land the other; but three things are, in fact, mentioned; and the word *both*, which, in strictness, can apply to two only, is perhaps improperly used in the place where it occurs in this sentence. But why may it not be considered as repeated three times, and the clause read thus: “unless the tenement shall consist of a dwelling-house or building, or both; or of a dwelling-house, or land, or both; or of a building, or land, or both.” By so reading it, effect will be given to the word *both* in its natural sense; and the intention of the legislature will be effectuated. Besides, building and land, for this purpose, are synonymous. Lord *Coke* says, “that land legally includeth all castles, houses, and other buildings; for castles, houses, &c. consist upon two things, viz. land or ground, as the foundation
or

or structure thereupon; so as passing the land or ground, the structure or building thereupon passed therewith (a).” In *Rex v. Macclesfield* (b), *Parke J.* expressed an opinion, that the occupation of a dwelling-house and another distinct building in the same parish, would confer a settlement; and there can be no reason why it should not, as well as the occupation of a dwelling-house and land. Then, as to the different parcels of the tenement being taken at different times, there is no difference between the statutes 6 G. 4. c. 57. and 59 G. 3. c. 50., as far as respects the present case. Before the 59 G. 3. c. 50., a settlement might be gained by the occupation of a tenement under different hirings; and in *Rex v. North Collingham* (c), and *Rex v. Tonbridge* (d), it was held, under that statute, that a tenement consisting of two parts, hired by the year, at different times, provided it was hired at the aggregate rent of 10*l.* per annum, and the whole was occupied for one whole year, would confer a settlement. The only difference (as to the present question) between that statute and the 6 G. 4. c. 57. is, that the first required the holding and occupation for a year, to be by *the party hiring*; but the second only requires the occupation to be *under the yearly hiring*; and in *Rex v. Ditchet* (e), and *Rex v. Great Bentley* (g), it was held, that a pauper who rented a tenement for a year at a rent exceeding 10*l.* per annum, but who underlet part, gained a settlement under the latter statute, the whole being occupied under the yearly hiring. To remedy the inconvenience resulting from those decisions, the 1 W. 4. c. 18. requires that the house, or building, or land, shall be occupied under the

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(a) *Co. Litt.* 4 a.

(c) 1 B. & C. 578.

(e) 9 B. & C. 176.

(b) 2 B. & Ad. 870.

(d) 6 B. & C. 88.

(g) 10 B. & C. 520.

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yearly hiring by the person hiring the same. It is immaterial whether the rent be payable to one or several, and there need not be a concurrent occupation of the several tenements for the space of one whole year, *Rex v. Ormesby (a)*, though in the present case there was.

DENMAN C. J. It has been often observed, that the word *tenement* in the decisions upon the statute 13 & 14 Car. 2. c. 12. has received a much larger construction than the legislature intended; but those decisions are so numerous, and have been acquiesced in so long, that we must abide by them, unless the legislature has in clear terms altered the law which they established. Now, if the statute 59 G. 3. c. 50. or 6 G. 4. c. 57. was intended to alter the law in this respect, it seems to me that the enactments have not hit this precise case. Under the first of those statutes it was held, that a settlement might be gained by the occupation of a tenement on different hirings. In *Rex v. Stow (b)*, a pauper, three weeks after *May-day* 1820, hired a house and land in the parish of *Stourton by Stow* for a year from the preceding *May-day*, at a rent of 15*l.* and at the expiration of that time hired it again for another year at the same rent. He occupied the premises from the time of the first hiring until six months after the second hiring, and paid the rent during the whole period; and it was argued that the house and land were not occupied as the statute required, for the term of one whole year. Abbott C. J. there says, "It has been contended, the legislature must have meant the hiring, occupation, and payment to be for the same year; if that had been their intention, it would have been easy to say that the occupation and

(a) 4 B. & Ad. 214.

(b) 4 B. & C. 87.

payment should be for *such* term;" and *Holroyd* C.J. says, "If it had been intended that the occupation should be for the same term as the hiring, the legislature would probably have introduced the words *for the said term*. It seems to me, that the words 'nor unless,' have been used in order to divide the sentence, and to exclude the construction now contended for on behalf of the appellants." Now those observations apply to the present case; for the words of 6 G. 4. c. 57., "unless such house or building, or land, shall be occupied under such yearly hiring," do not make any difference in this respect. I am of opinion, that the fact of the house and shed having been hired at different times will not prevent the gaining of a settlement. But it is said, that, as the statute requires that the tenement shall consist of a dwelling-house or building, or land, or both, it is not satisfied by a tenement consisting of a dwelling-house *and* building; but I think the mere collocation of the words "or both" in that sentence ought not to prevent the acquisition of a settlement by the occupation of any two of the three things there mentioned, and consequently that a settlement was gained in this case by the occupation of the dwelling-house and shed.

LITTLEDALE J. The word *tenement* means any thing which one man holds of another; and it may consist of several parts not contiguous to one another, and hired at different times. According to the argument, if a man were to hire three fields at three different times, at an entire annual rent of 10*l.*, or one half of a field at one time and the other half in six months afterwards, that would not constitute a tenement within the meaning of the statute; but I think it wholly immaterial whether the different parcels of the tenement be

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be hired at the same time or not. That being so, I am of opinion that the pauper was not prevented from gaining a settlement by reason of the house and shed having been hired at different times. . But then it is said the statute requires that the tenement shall consist of a dwelling-house, *or* building, or of land, or of *both*, and that the word *both* can apply only to two of the things previously mentioned, and that it must be referred to a dwelling-house and land, or a building and land, but not to a dwelling-house *and* building. The word *both* is improperly used in this sentence. But as no good reason can be assigned why a tenement (in order to confer a settlement) should not consist of a dwelling-house and building, as well as a dwelling-house and land, I think we are not bound by the inaccurate use of the word *both*, to hold, in this case, that the legislature meant to confine the meaning of the word *tenement* to a dwelling-house and land, or to a building and land. I think it includes a dwelling-house *and* building, as well as a building and land, and that it may even apply to all three.

PARKE J. I am of the same opinion. I am not sure that we shall, by our decision in this case, give effect to the intention of the legislature ; but that is so obscure, that we cannot say with precision what it is. It struck me, in *Rex v. Macclesfield (a)*, that the occupation of a dwelling-house and another distinct building in the same parish would confer a settlement. If that were not so, a distinct dwelling-house and a pig-sty taken at an entire rent of 100*l.* would not be sufficient for the purpose. I think the hiring of a distinct dwelling-house and of a distinct building, of the required annual value,

(a) 2 B. & Ad. 870.

is sufficient to confer a settlement. Then, as to the house and shed having been held under different hirings, *Rex v. North Collingham* (a) has decided that a tenement held under two distinct hirings was sufficient to confer a settlement under 50 G. 3. c. 50., and the statute 6 G. 4. c. 57. has made no alteration in that respect. The pauper, therefore, gained a settlement in *Leeds*.

Order of sessions quashed.

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The KING *against* The Inhabitants of
WOODBRIDGE.

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April 27th.

ON appeal against an order of two justices, dated the 8th of *February* 1832, whereby *Joseph Bird* was removed from the parish of *St. Matthew* in the borough of *Ipswich* in *Suffolk*, to the parish of *Woodbridge* in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case: —

To gain a settlement by serving an office, the party must reside in the parish where it is executed.

The pauper was, on the 29th of *September* 1820, appointed by the bailiffs of *Ipswich* a crane porter at the common quay in that town. The business of the crane porters is to unload vessels arriving at the common quay; it is a public annual office, and the pauper served it for a year. The quay where the vessels are unloaded is situated in the parish of *St. Mary at the quay*, at *Ipswich*, but during the whole of the year the pauper resided in the parish of *St. Matthew* in the same town; and the sessions, thinking the office was executed in the parish of *St. Mary at the quay*, were of opinion that no settlement was gained in *St. Matthew's*. If the Court should

(a) 1 B. & C. 578.

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be of the same opinion, the order of sessions was to be confirmed; if of the contrary opinion, the order to be quashed.

Austin, in support of the order of sessions, was stopped by the Court.

Biggs Andrews contra. It is not necessary that a party should reside in the parish where he executes his office. In *Rex v. Liverpool* (a), the pauper resided in the parish of *Liverpool*, but served the office of sexton in the chapel of *St. James*. The churchyard was partly in the parish of *Walton* and partly in the parish of *Liverpool*, but no corpse was ever buried in that part of the churchyard which lay in the parish of *Liverpool*; and it was held, that the pauper gained a settlement in *Liverpool*; yet he did not exercise his office therein. [*Parke J.* There the churchyard was in two parishes; and the Court held, that he gained a settlement in that in which he resided. The statute 3 *W. & M. c. 11. s. 6.*, which gives the settlement, enacts, that if any person who shall *come to inhabit in any parish* shall execute any public annual office in the said parish during one whole year, he shall be adjudged to have a legal settlement in the same. It contemplates, therefore, that the party shall reside in the parish.]

DENMAN C. J. The words of the statute are sufficiently explicit to shew that a settlement can be gained only by serving an office in the parish where the party resides. The order of sessions must be confirmed.

Order of sessions confirmed.

(a) 3 *T. R.* 118.

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The KING *against* MATTHEW SNOWDON.*Saturday,*
April 27th.

ON appeal by the defendant against four several rates or assessments, made for the relief of the poor of the parish of *St. Nicholas* in the town and county of *Newcastle-upon-Tyne*, for the months of *July, August, September, and October, 1831*, the sessions confirmed the rates, subject to the opinion of this Court on the following case:—

The lessee of toll traverse, and of a toll-house, (which he occupies), is not rateable to the poor for the tolls, but for the toll-house only.

The mayor and burgesses of *Newcastle-upon-Tyne* are, as well by prescription as by virtue of divers charters, and particularly a charter of the 31 *Eliz.*, constituted a corporation by the name or style of “The mayor and burgesses of the town of *Newcastle-upon-Tyne*,” and have been seised from time immemorial of the town and borough of *Newcastle-upon-Tyne* in their demesne as of fee, and hold the same in fee farm under the crown, at the yearly rent of 100*l.* The mayor and burgesses claim, as of right by prescription, to demand and receive as a toll thorough, divers tolls, dues, and duties, called the thorough toll or great toll, in respect of goods, wares, and merchandizes, not the property of a burgess of the town, brought into and carried out of the town, in consideration of their keeping in repair all the public streets of the town of *Newcastle-upon-Tyne*, and also two third parts of the bridge over the river *Tyne*, called *Tyne Bridge*, which connects the town with the county of *Durham*.

The appellant, who is not an inhabitant of the parish of *St. Nicholas*, is lessee under the mayor and burgesses of

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their toll-house, situate in the parish of *St. Nicholas*, at the north end of *Tyne Bridge* (one of the ancient avenues leading into and out of the town), and of such of the above-mentioned tolls as are collected at that avenue. The joint annual value of both tolls and toll-house is 500*l.*, but the annual value of the toll-house, when separated from the tolls, is only 10*l.*

By an act passed in 1822, the mayor, burgesses, and their lessee of the said tolls were authorized to take from all persons who should bring or convey into or out of the town, by any of the avenues or passages leading into or out of it, any goods, &c., liable to the said tolls, such tolls as the said mayor and burgesses were then, by law, entitled to receive in respect of the said thorough toll or great toll; and the act also authorized “the mayor and burgesses, and their lessee of the said tolls, to erect, set up, and maintain at all and every or any of the avenues or entrances leading into or out of the town, at which the said tolls should be demandable, any convenient or proper toll-house or building, with suitable conveniences for the accommodation of any person or persons to be employed in the collection of the said tolls, dues, and duties;” and it enacted “that every collector appointed to receive the tolls, should place his Christian name and surname, painted on a board in legible characters, in some conspicuous part of each toll-house immediately on his coming on duty, and continue the same so placed during the whole time he should be upon such duty.”

The toll-house in question is occupied by the servant or collector of the appellant, and the appellant's name is put up in front of the toll-house. The tolls are not actually paid to and received by the collector in the toll-

toll-house, but are collected from the parties liable to pay the same upon the street in front of, and as they pass, the toll-house. The total annual produce of the tolls received at all the avenues or entrances into the town, the title to which is founded on the consideration of repairing the streets, amounts to 4000*l.*, and it does not appear whether or not the appellant makes any profit. The rent under which the appellant holds these and other tolls is paid half yearly into the *Town Chamber*, the legal place of receipt of the corporation revenue. A separate account is kept of the sums received in respect of the whole of the tolls called the thorough toll, and likewise a separate account of the sums expended in repairing the streets, the consideration on which the title to those tolls is founded; but in no one year has the aggregate amount of the sums received for these tolls been sufficient to defray the expence of keeping the streets in repair; and no regard is paid to the sum received in regulating the amount expended on the streets, the deficiency being supplied, as a matter of course, out of the general fund of the corporation. The appellant is rated in all the four rates or assessments as follows; viz. "*Snowdon, Matthew*. Toll-house situated at the north end of *Tyne Bridge*, and the tolls payable there, 500*l.*"

The question for the opinion of this Court was, whether the appellant were rateable for the toll-house and tolls, or either of them. If for the toll-house alone, then the four rates or assessments appealed against were to be amended, by striking out in each "*and the tolls payable there,*" and substituting the figures 10*l.* for the figures 500*l.* If he were rateable for neither the tolls

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nor the toll-house, then the order of sessions was to be quashed. If he were rateable for the tolls either alone, or together with the toll-house, the order of sessions was to be confirmed, with such amendment, if any, with respect to the amount on which the rate was made, as the Court should see fit.

Aglionby and *T. Greenwood* in support of the order of sessions. The mayor and burgesses of *Newcastle* being seised in fee of the town, the soil of the streets is in them. The toll, therefore, paid to them for passing over their soil is a toll traverse, and their lessee is rateable in respect of such tolls constituting the profits of the land. This is something like *Rickards v. Bennett* (a), where in trespass against a lord of a manor, he, in his plea, set out various burdens borne by him; and then prescribed, not by reason of those burthens, but generally as lord of the manor, for a toll upon all goods bought and delivered, or bought elsewhere and brought into and delivered in a town within the manor, which from time immemorial had been parcel of the manor; and it was held, after verdict, that this was good as a claim of toll traverse, although the burthens set out did not constitute a sufficient consideration for a toll thorough. It is true the sessions have found that it is called and that the corporation claim it as a *toll thorough*; but it is manifestly a toll traverse, being taken for passage over the soil which is in the corporation. [*Parke J.* Assuming it to be a toll traverse, the lessee is not an occupier of

(a) 1 B. & C. 223.

any part of the soil, in respect of which the tolls arise.] The act of parliament authorizes the corporation or their lessees to take from all persons, who shall bring or convey into or out of the town, by any of the avenues or passages leading into or out of it, any goods, &c., such tolls as the corporation are by law entitled to receive in respect of the toll called thorough toll or great toll, in consideration of their keeping in repair the public streets. It also authorizes the corporation to erect and maintain toll-houses, and requires every collector of the said toll dues and duties, to place his Christian and surname, painted on a board, in legible characters on the said toll-house. Here the appellant's name was affixed to the toll-house, and he, by his servant, occupied the toll-house, and received the tolls; and he is rateable for both. If this were a toll thorough, the question might be different; but in *Rex v. Eyre (a)*, where it was held that the lessee of the tolls of a public bridge was not rateable to the poor in respect of them, it was not stated that he was the occupier of a toll-house. Here the lessee, by his servant, was the occupier of a toll-house erected at one of the avenues where toll was demandable. [*Parke J.* That occupation makes him liable to be rated in respect of the profits of the toll-house; but if that were pulled down, or he did not occupy it, he would be entitled to receive the tolls. Assuming the toll to be a toll traverse, it would be paid for passing over the soil of another. The lessee of the tolls here does not occupy any portion of the soil in respect of which the toll is payable; he is rateable, therefore, for his house, but not for the tolls.]

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(a) 12 East, 416.

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The Court, without hearing *Ingham* on the other side, directed the rate to be amended, by striking out the tolls and substituting 10*l.* for 500*l.*

Rate amended accordingly.

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The KING *against* The Inhabitants of St.
HELENS AUCKLAND.

A pauper agreed with the owners of a colliery to work constantly in the said colliery, from the 4th of February 1815, to the 4th of February 1816, or to forfeit and pay to his master 1*s.* for each and every day he should absent himself from his work, or not work a reasonable day's work to the satisfaction of his master: Held, not an exceptive hiring.

UPON appeal against an order of two justices, whereby *George Riley* was removed from the township of *Coundon* in the county of *Durham*, to the township of *St. Helens Auckland* in the same county, the sessions confirmed the order of removal subject to the opinion of this Court on the following case:—

The pauper was bound as a pitman to *Dixon and Co.*, the owners of the *Eden Main Colliery*, situate in the township of *West Auckland* in the county of *Durham*, by bond or memorandum of the 4th of February 1815, between *G. D. J. D.* and *E. D.*, as copartners in the said colliery of the one part, and the several pitmen whose names were thereunder written on the other part, whereby it was witnessed that the said pitmen, in consideration of the wages to be paid as after-mentioned, did thereby severally agree with the said co-partners or masters to hew, pit, and work coals within the said colliery, from the day of the date thereof *for and unto the 4th day of February* 1816, in the manner and at the prices following; that is to say, to hew coals at 2*s.* 6*d.* a score of twenty-five corves to each score; the said pitmen also agreed to give to the said masters the usual fire coal corf for each day they were at work, over and

above

above the said number of twenty-five corves to each score; and further to drive their boards of such a breadth, and to prop and maintain their own work, and to work in a workmanlike manner, properly, fairly, and orderly, as directed by their said masters, or their agent for the time being; and to drive headways at 8*d.* a yard, and headways walls at 6*d.* a yard, when, where, and in such a manner as directed by the said masters or their said agent: and further, the pitmen agreed to send as many setters to bank as the seam would admit and afford; and also to put coals in their course at the prices then given, and to have the liberty to hew half a score of coals in the putting morning, which were to come to bank the same day. *“ And the said pitmen do hereby further severally undertake, promise, and agree, to work constantly at the said colliery until the said 4th day of February 1816, or to forfeit and pay, each man, to the said masters or their said agent, one shilling for each and every day that he shall absent himself from the said work, or not work a reasonable day’s work, to the satisfaction of the said masters or their said agent. And on the other hand, the said masters, for themselves, agree to pay to each said pitman one shilling a day for each and every day they shall wilfully, or without just cause, lay any of them off work.”*

The pauper served under this bond for a whole year, and received his wages; and during that period there was no forfeit incurred either by him or his employers, by reason of any interruption of the work in the colliery, or otherwise. He remained in the service of the same employers as a pitman for eleven months after the expiration of the bond, and from the date of the bond to the time of his finally quitting the colliery,

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a period of nearly two years, he slept in the appellant parish. The question for the opinion of this Court was, whether this was a service under such a yearly hiring as would confer a settlement?

Ingham in support of the order of sessions. This was clearly a hiring for a year, and not exceptive. The case falls within *Rex v. Byker* (a). There the pauper was hired by indenture, for a year, as a driver in a colliery at the wages of 1s. 10d. for a good day's work not exceeding fourteen hours, and 2d. a day more when that time was exceeded; and he was to forfeit 10s. 6d. for every act of disobedience, and 2s. 6d. a day for lying idle, or for absence on working days, to be deducted out of his wages; and there was a covenant, that in case the master, about *Christmas*, should wish to repair any engine belonging to the colliery, he might stop the workings for any period not exceeding seven days, without paying any wages; and it was held that this was a conditional and not an exceptive hiring. Here, if the agreement was conditional, the condition has not been acted upon: but it appears clearly to have been absolute. The case is even stronger than *Rex v. Byker*, for the pitmen agree to work *constantly* during the whole year, which gives the masters a right to their service at all times, subject only to the implied exception of hours for food and rest, *Rex v. All Saints Worcester* (b). And the daily work is to be "a reasonable day's work, to the satisfaction of the masters." In *Rex v. Gateshead* (c), which will be relied on by the other side, it was

(a) 2 B. & C. 114.

(b) 1 B. & A. 322.

(c) 2 B. & C. 117, note.

stipulated

stipulated that each man should, *on each working day, do such a quantity of work as should be deemed equal to a full day's work*; and not leave the pit until that quantity was completed, or in default thereof, he should forfeit 2s. 6d.; and the Court held it to be an exceptive contract, because the pauper was not to be under the controul of the master for the whole of every day. In that case, as reported in 3 *Dowling and Ryland*, 333. note *b*, there was an express exception in the contract, for the labourers were to work for the whole year except ten days during the *Christmas* holidays. If that be correct, the case differs essentially from this. The proviso there (which appears also in *Rex v. Byker*, but not in the present case,) that the jurisdiction of the justices should not be ousted, was held to be immaterial.

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Stephen Temple contra. This was an exceptive hiring, for the agreement did not give the master a controul over the servant during the whole year. If it was not an exceptive, it was a conditional hiring. But in *Rex v. Byker* (a), *Bayley J.* says, "If the bargain be originally made for an entire year, and terms are introduced applicable to a continuance of the relation of master and servant during the whole year, but there is also a provision, that in a given event it shall be competent to the parties to put an end to or suspend the service for a part of the year; still a settlement is gained if the service is actually performed for a whole year, and neither party avails himself of the condition. A conditional hiring is, for this purpose, the same as an absolute hiring, unless the condition is acted upon."

(a) 2 B. & C. 120.

Here

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Here there was no absolute agreement by the pitman to work for a whole year, but he had the option either to work or to absent himself at any time, on paying 1s. per day. [*Parke J.* That is like the stipulation in *Rex v. Byker* to forfeit 2s. 6d. for lying idle.] By the first clause of the indenture in that case, the master hired, and the other parties hired and bound themselves as workmen or servants, for a whole year, to serve in the colliery for certain wages; and the master then covenanted to pay for every good and sufficient day's work not exceeding fourteen hours (and 2d. a day when that time was exceeded) 1s. 10d.; and then the several persons hired, covenanted with the master to obey his orders as to the manner of working, and to work the colliery fairly and regularly, or in default thereof, to forfeit 10s. 6d. for every act of disobedience, and 2s. 6d. per day for lying idle, and the same sum for every working day when they should absent themselves from their employment; and the Court were of opinion that the mention of fourteen hours in the master's covenant was introduced there for the purpose of measuring the wages payable by him; and that the stipulation in the covenant of the workmen, that they should forfeit 2s. 6d. per day for every day they should be idle or absent themselves, did not authorize them to absent themselves if they thought fit, but was inserted merely to enforce regular attendance. But the present is a very different case; for here the pitmen do not contract to serve the master absolutely for a year, but they agree to hew and work coal from the 4th of *February* 1815 to the 4th of *February* 1816, in the manner following, and afterwards they stipulate to work constantly at the colliery until
the

the 4th of *February* 1816, or to forfeit 1s. a day for absence or not doing a reasonable day's work. They have an option, therefore, to work constantly at the colliery, or to absent themselves on payment of the fine. This case falls precisely within *Rex v. Gateshead (a)*, where the pauper was hired to work in a colliery from the 5th of *April* 1813 to the 5th of *April* 1814, and it was stipulated that each man should, *on each working day*, do such a quantity of work as should be deemed equal to a full day's work; and should not leave the pit until that quantity was completed, or in default thereof should forfeit 2s 6d. The expression *each working day* imported that there were days when the pitmen might absent themselves; and it was held to be an exceptive hiring because the pauper had not subjected himself to the controul of his master for the whole year.

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DENMAN C. J. The decisions in *Rex v. Byker (b)*, and *Rex v. Gateshead (a)*, run very near each other; but there is a distinction between them, and I think the former case an authority in favour of a settlement here. It is said that in this contract there is an exception, because an option is given to the pauper, either to work or to forfeit and pay 1s. upon each day that he absents himself or does not work a reasonable day's work to the satisfaction of the master. In *Rex v. Byker*, the pauper, by indenture, was hired for a year as a driver in a colliery, and the master covenanted to pay wages at the rate of 1s. 10d. for a good day's work, not exceeding fourteen hours, and 2d. a day more when that time was ex-

(a) 2 B. & C. 117. note.

(b) 2 B. & C. 114.

ceeded,

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ceeded, and the pauper was to forfeit 2s. 6d. per day for lying idle, to be deducted out of his wages. It was contended, that that was an exceptive contract, because the master could not compel the pauper to work more than fourteen hours a day, and also because the pauper, on the payment of 2s. 6d. per day, was at liberty to absent himself. But the Court held, that the fourteen hours was only mentioned in the master's covenant to regulate the amount of the wages, and that the relation of master and servant continued during the whole twenty-four hours of every day, and consequently during the whole year; and that the clause as to forfeitures was intended not to give the servants a liberty to absent themselves, but merely to enforce regular attendance. The same observation applies to the clause of forfeiture in this case. In *Rex v. Gateshead* it was stipulated, that each man should, on each working day, do such a quantity of work as should be equal to a full day's work, and should not leave the pit until that quantity was completed, or, in default thereof, should forfeit 2s. 6d. There, as soon as each man completed his full day's work, he was at liberty to quit, and was no longer under the controul of his master. According to the report of that case in 3 *Dowling & Ryland*, it was part of the contract of hiring, that the labourers were to work for the whole year, except ten days during the *Christmas* holidays, when they were not to work, nor to be liable to any penalties for not working. If that were a correct statement of the contract, there would be a clear exception of ten days. It appears, however, from the reasoning of the Judges there given, that the hiring was held to be exceptive, not because the pauper was not bound to work for his master during the ten days, but because he was
not

not bound to work during the whole of every day, but during such part of the day only as might be required to complete a full day's work. The contract, as stated in 2 *Barnewall & Cresswell*, 117., was, that the master should find work for the men during the whole year, and forfeit 2s. 6d. for every day that he should oblige them to be idle, except at the *Christmas* holidays, which were not to exceed ten days. According to that statement, the stipulation, as to the ten days, would appear not to be an exception in the contract of hiring, intended to give a privilege to the servant, but to be a provision introduced for the benefit of the master; and, considering the reasons on which the judgment of the Court was founded, that must be taken as the correct report of the case. I think, therefore, this case falls within *Rex v. Byker*, and that a settlement was gained in the parish of *St. Helens Auckland*. The order of sessions must be confirmed.

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LITTLEDALE J. If the cases referred to had never been decided, I should not have had the slightest doubt on this case. By the agreement of the 4th of *February* 1815, the pauper agreed to hew, pit, and work coal till the 4th of *February* 1816, and to work constantly at the colliery or to forfeit 1s. for each and every day he should absent himself or not work a reasonable day's work. Now, the latter stipulation bound the pauper to pay 1s. per day, if he did not perform his part of the contract. There was a contract to work for a whole year and every day in the year, and the master had a right to call on the pitmen so to work. The mere agreement to pay 1s. per day as a forfeiture does not make the contract exceptive, because neither party can be supposed to have contemplated,
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at the time when the contract was entered into, that there should be an absence or neglect to work.

PARKE J. I felt some little difficulty, at first, in distinguishing this case from *Rex v. Gateshead* (a), but I think it falls within *Rex v. Byker* (b). In the first of those cases there was a stipulation that each man should, on each working day, do a full day's work, and that he should not leave the pit until that quantity of work was completed, and that, on default thereof, he should forfeit 2s. 6d. It was therefore stipulated by implication, that the men were not to be under the controul of the master on days which were not working days, nor on any day as soon as a full day's work was completed.

Order of sessions confirmed (c).

(a) 2 B. & C. 117. note.

(b) Ibid. 114.

(c) See *R. v. Osselt cum Gawthorpe*, ante, 216.

ROWE *against* SHILSON and Another.

An embankment company was by an act of parliament (not limited in duration) empowered to

make a road, and to erect turnpikes upon or across "any lanes or ways leading or that might thereafter lead out of the same;" and to take tolls at such turnpikes. By subsequent acts, another company was empowered to make a railway, and it was enacted, that all persons should have free liberty to use the same, with carriages properly constructed, upon payment only of such rates and tolls as should be demanded by the railway company, not exceeding the sums mentioned in that act. The railway was afterwards made, and it crossed the embankment company's road:

Held, first, that the railway, though made and opened to the public by act of parliament, was a "way" within the meaning of the first-mentioned act. Secondly, that the clause in favour of the public in the railway act, did not take away the vested right of the embankment company to their tolls; and, consequently, that they might take toll of persons crossing their road upon the railway.

By

By act of parliament 42 G. 3. c. 32. certain persons were incorporated by the name and style of “The Company of Proprietors for embanking Part of the *Lairy* near *Plymouth*” (a); and the embankment was accordingly made by the company. By an act 43 G. 3. c. xv. the company were empowered to make and maintain a road from *Efford Quay* in the said county to the borough of *Plymouth*; and it was also enacted as follows:—“That it shall and may be lawful to and for the said company to erect or cause to be erected such and so many turnpikes to receive the tolls hereby granted upon or across the said road, and on or near the sides thereof, or in, near, upon, or across any lanes or ways leading or that may hereafter lead out of the same, as they shall think proper.” And that in consideration of the great expences the said company must incur by making, maintaining, and supporting the said road, it was enacted “that it should be lawful for the said company to demand and take or cause to be demanded and taken at the said turnpikes, amongst other tolls therein mentioned, for every waggon,” &c. And that the company might let the tolls to farm. The road was soon after made pursuant to the act.

By an act, 59 G. 3. c. cxv., for making and maintaining a railway or tram-road from *Crabtree*, in the parish of *Egg Buckland*, in the said county, to communicate with the prison of war on the forest of *Dartmoor*, in the said county, reciting that such railway would be of material benefit and convenience to the neighbourhood and the country at large, a company was incorporated for making, completing, and maintaining the same,

(a) See *Lowe v. Govell*, 3 B. & Ad. 863.

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against
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under

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against
Bailson.

under the name of “ The *Plymouth* and *Dartmoor* Railway Company,” and was invested with certain powers for that purpose. The act provided, among other things, that when the said railway should cross any turnpike-road or public highway, the ledge or flank of such railway, for the purpose of guiding the wheels of the carriages, should not exceed one inch in height above the level of such road : and it is thereby further enacted, in consideration of the great charge and expence which the said company must incur and sustain in making and maintaining the said railway and other the works thereby authorised to be made and maintained ; that it shall and may be lawful for the same company, from time to time, and at all times thereafter, to ask, demand, take, recover, and receive, for the use of the same company, for the tonnage of all goods, wares, merchandizes, and other things which shall be carried or conveyed upon the said railway, or upon any part thereof, certain rates and duties therein mentioned : And it is thereby further enacted that all persons shall have free liberty to pass upon and use the said railway, with carts, waggons, or other carriages, properly constructed, as thereafter mentioned, and to employ the said company’s wharfs and quays for loading and unloading such goods and other things, upon payment only of such rates and tolls as shall be demanded by the same company, not exceeding the respective sums therein mentioned, subject to the rules and regulations which shall, from time to time, be made by the said company, by virtue of the powers therein granted. The railway was completed by the company at a great expence, the time being somewhat varied afterwards by an act of 2 G. 4., which it is unnecessary to notice further.

By

By an act, 1 G. 4. c. liv., reciting that a branch railway, to join the *Plymouth* and *Dartmoor* railway, and to communicate with certain places there mentioned, would be of public utility, the Railway Company were empowered to make, complete, and maintain such branch railway, and to execute and perform all such works, matters, and things as should be requisite and convenient for that purpose. And it was enacted, that the said statute of 59 G. 3., and the several powers, authorities, directions, restrictions, provisions, rates, duties, and other matters and things therein contained, should be used and exercised by the said Railway Company, and be applied, enforced, and put in execution for making, completing, preserving, and maintaining the said branch railway, and also for making, erecting, doing, and performing all such other works, matters, and things as they should think necessary or expedient for the benefit of such railway, and for defraying the expenses thereof; and should and might also be used and exercised by the owners and proprietors of lands lying near or adjoining to the said branch railway, in such and the like manner, and as fully and effectually, as if the several powers, authorities, restrictions, provisions, rates of tonnage, and other matters and things contained in the same act, had been repeated and re-enacted in the body of that present act, and as if the branch railway and other works, by the same act authorized to be made, completed, and maintained, had been described in the said act passed in the fifty-ninth year aforesaid, as part of the works to be made and done by virtue of that act.

The branch railway was made accordingly, and it crossed the Embankment Company's road in two places; at one of which, on the side of their turnpike-road, the

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company erected a toll-bar. The toll, fixed by the act 43 G. 3. c. xv., was demanded on behalf of the company's lessee (the plaintiff in this cause), from a servant of the defendant, who passed with a waggon on the railway across the Embankment Company's road, and through the turnpike-gate. He had paid the regular tolls for passing along the railway. If the Court were of opinion that the plaintiff was entitled to recover, a verdict was to be entered for him for such sum as they should think proper; otherwise a nonsuit. This case was now argued by

R. Bayly for the plaintiff; who relied upon the words of the act 43 G. 3. c. xv. (empowering the Embankment Company to make the road and receive tolls), and contended that the branch railway in question was a way leading into and out of the Embankment Company's road, within the meaning of that act, and across which they were authorized to place bars for the receipt of toll; that there was nothing in the acts for making the principal and the branch railway to supersede this right of the company; and that there could be no argument, on the ground of hardship, against the right of taking toll for merely crossing a road, since the general exemption in this case only existed by an express provision in the Turnpike Act, 3 G. 4. c. 126. s. 32., and that, by 4 G. 4. c. 95. s. 90., did not extend to roads maintained under acts of parliament passed for an unlimited period, which was the case with the Embankment road.

Butt contra. A railway like this is a public highway. *Rex v. The Severn and Wye Railway Company* (a); and

(a) 2 B. & A. 646.

the

the acts establishing it have given the public a right to pass along it, “ upon payment only of such rates and tolls as shall be demanded by the Railway Company, not exceeding the sums mentioned ” in the act 59 G. 3. c. cxv. That right, according to the settled rule on such subjects, cannot be fettered with a new pecuniary imposition, unless by clear and unequivocal words of an act of parliament. Now, by the act just referred to, the only tolls to be paid on the railway are those demandable by the Railway Company. It is true, that at that time the branch was not formed; but, by 1 G. 4. c. liv., all the provisions of the former act are made applicable to the branch road, as if that road had been therein described; and beyond this there is nothing in the act of 1 G. 4. to impose any charge on the public in respect of the branch road. Besides, the words (43 G. 3. c. xv.) enacting that the Embankment Company may erect turnpikes on their road “ in, near, upon, or across any lanes or ways leading, or that may hereafter lead, out of the same, as they shall think proper,” does not, by the terms used, apply to public highways, established by act of parliament.

DENMAN C. J. There is no doubt that parties who seek to burden the public with an imposition of this kind must establish a clear title to do so. The authority here relied upon is in the words of 43 G. 3. c. xv., enacting, that it shall be lawful for the Embankment Company to erect turnpikes for receipt of tolls, upon or across the road to be made by them, and on or near the sides thereof, or in, near, upon, or across any lanes or ways leading, or that may thereafter lead, out of the same, as they shall think proper; and to demand and take at such turnpikes the tolls mentioned in the act. I think

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this, if nothing followed, would give a clear right of taking toll for passage upon roads crossing the Embankment Company's road. It is said, indeed, that the clause does not apply to roads made by public authority; but there is nothing in the words themselves to support such a distinction; and although the road in question is made by public authority, it is for the advantage of the company who obtain the act. Then, does the statute 59 G. 3. c. cxv. make any alteration in the case? That only enacts, that all persons shall have liberty to use the railway with carriages properly constructed, upon payment only of such rates and tolls as shall be demanded by the Railway Company, not exceeding the sums mentioned in the act. That appears to me not to take away the former right of the embankment company, but only to prescribe what amount of toll shall be taken by the proprietors of the railway. If it had been intended by the statute to do what would certainly be a violent act, namely, to deprive the Embankment Company of tolls which they before enjoyed in the manner here suggested, that purpose would, I think, have been more clearly expressed.

LITTLEDALE J. I think the clause imposing the tolls in 43 G. 3. c. xv., extends to all roads, whether made by private individuals or by authority of parliament. If it was meant that any kind of road to be thereafter made should be exempted from the tolls granted to the Embankment Company, that should have been done by express words. I am also of opinion, that those tolls are not taken away by the subsequent act, which gives liberty to all persons, with carriages of a certain description, to use the railway, on payment only of the
tolls

tolls there mentioned. The object of that enactment is only to point out what persons shall use the railway, and what they shall pay the Railway Company for so doing. It is true that, if plaintiff's claim is well founded, they cannot cross the Embankment Company's road without paying other tolls; but we cannot, on that account, say that the Railway Act takes away the tolls before granted to the Embankment Company.

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PARKE J. I am of the same opinion, though I have entertained some doubts. I agree in what has been urged, that the Embankment Company, as a private body, could not acquire the rights in question against the public unless the legislature expressly gave them. The clause which has been relied upon by the plaintiff in 43 G. 3. c. xv. does clearly give such rights; the only question is, how far they operate upon roads afterwards made. There is no doubt that if the Railway Company had by contract, without the intervention of parliament, acquired the power of making their road to lead into the embankment road, that would have been a way within the express meaning of the clause in question. But it is necessary to go a step further. A railway leading into that road is made by an act of parliament, which confers certain rights upon the public: and the question then is, as to the effect of the former act upon such new public way. Upon this point I had some doubt; but I am of opinion that unless the subsequent act expressly takes away the vested right which the Embankment Company had in the tolls before granted, the public are not entitled to cross their road without paying toll. Then, what is there to give the public that right? The liberties they are to enjoy in respect of the principal

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against
Shilson.

railway are stated in the act 59 G. 3. c. cxv. ; and although that clause is not expressly re-enacted, as to the branch road, in 1 G. 4. c. liv., yet this latter statute provides that the several powers, authorities, directions, restrictions, provisions, rates, duties and other matters and things, contained in the first Railway Act shall be used and exercised by the Railway Company, and shall be applied, enforced, and put in execution, for making, completing, preserving and maintaining the branch railway, and for doing what shall be necessary for the benefit, and for defraying the expenses thereof, as if the several powers and authorities, rates and other matters, contained in the former act, had been re-enacted in this, or as if the branch railway had been described in that act. The latter act, therefore, incorporates and explains the clause in question in 59 G. 3. c. cxv. I think that clause was merely a bargain between the Railway Company and the public, that the public should use the railway upon certain terms, but not subject to any greater tolls than were stated in the act. The company were to be prevented from enhancing the duties above the original rate. But this does not enable persons to cross the road of another company without paying the rates before claimable by them ; and unless the act did take away the vested right of that company, the public would not be entitled to resist the present demand. On the whole, therefore, I agree that the plaintiff ought to recover.

Postea to the plaintiff.

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against
STORY.

was then paid, the purchaser, with the assent of all parties, giving one check, in part of the purchase-money, for *Fullwood's* principal and interest, and the defendant's costs. The clerk gave the following receipt: — "Received of Mr. *Pemberton*, by the direction of *J. W. Ogle*, Esq. (the plaintiff), the sum of," &c. "for costs, as by bill annexed." The deeds were then handed over, and the purchase completed. The plaintiff having afterwards ascertained that the bill was not such as a mortgagor could fairly have been called upon to pay (which was admitted at the trial), brought this action to recover back the excess, which he had been compelled to pay in order to obtain possession of the deeds. For the defendant it was insisted, that, as an attorney holding deeds of his client, he had a lien upon them for the whole of his bill of costs, against all the world; that it was immaterial to him by whom the bill was paid, but without payment he was not bound to hand them over, or even bring them to the meeting; that the complaint was, not so much that the bill was exorbitant, as that a mortgagor ought not to pay it: if the bill was in itself excessive, that was a question between *Fullwood* (the mortgagee) and the defendant; and the present action if maintainable by the plaintiff, should have been brought against *Fullwood* himself. Lord *Tenterden*, however, was of opinion that the plaintiff was entitled to recover, and he directed a verdict accordingly, but gave leave to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

Sir *James Scarlett* and *Platt* now shewed cause. The defendant could not enforce any lien for more than the amount he was entitled to receive from the plaintiff; and

and that amount is measured by the terms of the mortgage deed. When the mortgage was redeemed, the deeds in question were no longer *Fullwood's*. As soon as his principal, interest, and reasonable costs were paid, he was bound to hand them over. The defendant then could not claim to retain one man's title-deeds for another's debt. His lien upon them was commensurate with *Fullwood's* right. Whether the defendant's charges were just or not, as between him and *Fullwood*, is nothing to the plaintiff. The defendant might have desired the plaintiff to settle the costs with *Fullwood*, who could not have claimed more of the plaintiff than the proper costs as between those parties; but, instead of that, he has chosen to stand in *Fullwood's* place, and receive the costs himself from the plaintiff. He was not, then, entitled to demand more than would have satisfied *Fullwood*. He made himself, in fact, his agent in that transaction. [*Parke J.* *Fullwood* had a legal interest in the deeds, and might pledge them. He did pledge them with his own attorney for the amount of his bill. Could not the attorney retain them till that was paid?] He knew, when he received them, what was the extent of the depositor's interest. If the defendant is not liable in the present action, there is no opportunity of taxing his bill; and that might be alleged by *Fullwood*, if the plaintiff sued him on account of these charges.

F. Pollock and *Kelly*, contra, were not heard.

DENMAN C. J. It is not contended that the mortgagee had not a right to pledge these deeds. Then a party who takes property subject to a mortgage, must
ask

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against
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against
STORY.

ask where the title-deeds are: he must take care to secure himself. It makes no difference that the person with whom they were pledged was the mortgagee's attorney. The rule must be absolute.

LITTLEDALE J. I am of the same opinion. The plaintiff should have ascertained before in whose hands the deeds were.

PARKE J. The defendant had a lien for the amount to which he was entitled against *Fullwood*. He, as mortgagee of the property, was competent to pledge the deeds with the defendant for that sum. The fact is, that the plaintiff has overpaid *Fullwood*; and he should have taken his remedy against him.

Rule absolute.

1833.

JOHN NURSE and MARY, his Wife, J. HARRIS,
and Two Others, *against* C. WILLS, Gent.
One, &c.

Monday,
April 29th.

THE declaration stated, that, by agreement between the plaintiffs and the defendant, — reciting that one *James Lang* had been arrested at the suit of the plaintiffs; that the defendant had become bail to the sheriff; that the bail bond had been forfeited; that *Lang* had confessed the action, and damage sustained by the plaintiffs to the amount of 200*l.*, and had consented that judgment should be entered up, and execution should issue for the debt and costs due to the plaintiffs from *Lang*, — it was agreed between the plaintiffs and the defendant, and the defendant undertook and promised, *in consideration that the plaintiffs should not nor would enter up judgment, or sue out execution, or proceed further in the suit, or take any further steps therein against Lang, the sheriff, or the bail, until a certain day, — that the defendant should render Lang on that day, so that the plaintiffs might have the full security of his body, or, in default, should pay to the plaintiffs 137*l.* 15*s.* 2*d.*,*

Declaration *Shew - 24*
by husband and wife, stated that
by agreement
between the
plaintiffs and the
defendant, —
reciting that
one *J. L.* had
been arrested
at the suit of
the plaintiffs;
that the de-
fendant had
become bail to
the sheriff; that
the bail had
been forfeited;
and that *J. L.*
had given a
cognovit for
the debt and
costs, — it
was understood
and agreed
between the
plaintiffs and
defendant, and
the defendant
undertook and
promised, in
consideration
that the plain-
tiffs would not

enter up judgment, or sue out execution against *J. L.* until a certain day, that he, the defendant, would render *J. L.* on that day, or, in default, pay the debt and costs. Averment, that the plaintiffs had not entered up judgment or sued out execution against *J. L.* before the day. Breach, that the defendant did not render *J. L.* on the day, or pay the debt and costs:

Held, on motion in arrest of judgment, after verdict for the plaintiffs,

First, that, as the agreement was stated to be *with* the plaintiffs, the promise must be taken, after verdict, to have been made *to* them.

Secondly, that it sufficiently appeared that the wife had a joint interest, because the recital in the agreement of a cognovit by *J. L.* to *all* the plaintiffs, was an admission by the defendant of such joint interest.

Thirdly, that, though the agreement by the wife was void, it might be rejected as surplusage, and that the count would then be good, as stating a promise to pay the debt and costs to the plaintiffs, in consideration that they would not enter up judgment, or sue out execution until a given day.

being

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 ROBERTS
 against
 DAVY.

not appear. It is consistent with the facts stated in the pleadings, that the plaintiff may be the owner of the other two thirds. *Parke J.* Possession is not sufficient, provided it be necessary that some one in privity with the grantor should have done an act to determine the licence.] No entry or claim by the grantor, or any person claiming under him, was necessary to determine this licence. A licence lies only in grant, and not in livery; and, therefore, re-entry is not necessary to determine it. There is a distinction between a condition annexed to a freehold lease and one annexed to a lease for years. A lease for life cannot commence by words without other circumstances, viz. livery and seisin, and therefore shall not be determined without entry; but a lease for years may begin by words without entry, and may be determined by words without entry, *Browning v. Beston (a)*; and *Co. Litt. 214. b.* is to the same effect. And when the land itself remains in the possession of the grantor, no entry or claim by him is necessary to determine the grant. In *Co. Litt. 218. a.* it is said, "if I grant a rent-charge in fee out of my land upon condition, there, if the condition be broken, the rent is extinct in my land, because I (that am in the possession of the land) need make no claim upon the land, and, therefore, the law shall adjudge the rent void without any claim." In *Digges's case (b)* it is said to have been agreed in 20 *E. 4.* 18 and 19 *a.*, that "if a feoffment be made upon collateral condition, and before the condition performed the feoffee leases it to the feoffor, if afterwards the feoffee doth not perform the condition, the land shall be in the feoffor immediately

(a) *Plowden*, 135, 136. 1 *Wms. Saund.* 287. c. note 16.

(b) 1 *Rep.* 174. 5th edit.

without

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 against
 DAVY.

without entry or claim, *because he himself is in possession of the land*. So if a villein purchases rent which is issuing out of the lord's land, it shall be in the lord without entry or claim of the lord; for if he should make an entry or claim, it ought to be upon the land, and that is not necessary *when he himself is seised thereof*."

The necessity of an entry depends on the wording of the condition. "If the words be, that upon the doing of an act the reversioner may enter, there must be an entry to avoid the estate; but if the estate be granted upon condition that if the grantee do such an act the estate shall thereupon immediately cease and determine, then no entry is necessary:" per *Bayley J.* in *Fenn dem. Matthews v. Smart (a)*.

DENMAN C. J. There is nothing to connect the plaintiff with *Ustwicke*, and it is possible he may have come in by title inconsistent with that of *Ustwicke*, who had only a third part in the lands. Assuming, however, that it had appeared that he represented the grantor of the licence, I think it quite clear, according to *Doe v. Banks (b)*, and on the wording of this grant, that it was necessary for him to have done some act shewing his intention to determine the licence; until such act were shewn, it continued in force.

LITLEDALE J. The replication cannot be supported; it seems to me that, according to *Doe v. Banks (b)*, this instrument was liable to be rendered void only at the election of the grantor. If it had been a freehold lease of land subject to a condition

(a) 12 *East*, 448.(b) 4 *B. & A.* 401.

that

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STEARN
against
MILLS.

gone much discussion there; and I cannot concur in that decision. One objection is, that for the purpose of the stamp duty, the executor must include, in the amount sworn to, debts due to the testator, though not recovered. I am of opinion, that in the present case, *Mills* was not shewn to be responsible, and that he was entitled to a verdict.

Rule absolute to enter a verdict for *Mills*.

Tuesday,
April 23d.

ROBERTS *against* DAVEY.

NE 703
ad 442
18-440

Trespass for breaking and entering the lands of the plaintiff, and sinking pits. Plea, that before the plaintiff had any thing in the said lands, one *U.* was seised in fee of one undivided third part therein, and, by indenture, granted to *B.*, licence to dig, mine, &c. throughout his one third part, with liberty to erect engines, &c. for the term of twenty-one years; that before the expiration of the term the grantee died, and his executrix became legally entitled to the enjoyment of the licence, and because she could not enjoy it so fully as it was lawful for her to do without committing the supposed trespasses, the defendant; as her servant, entered upon the said lands, and upon the plaintiff's possession, and committed the same.

TRESPASS for breaking and entering the lands of the Plaintiff, called *Carvannell*, in the parish of *Gwennap*, in the county of *Cornwall*, and sinking shafts, and carrying away ore. Plea, that on the 7th of *June* 1821, long before the said time, when, &c., and before the Plaintiff had any thing in the said lands, one *Stephen Ustwicke* was seised in fee of one undivided third part in the said lands; and by indenture between him of the one part, and *John Bullocke* of the other part, he, *Ustwicke*,

Replication, that the supposed licence was granted subject to a condition, "that if the grantee, his executors, &c. should neglect to work the mines for a certain time, or should fail in the performance of all or any of the covenants, then and from thenceforth the indenture and the liberties and licences thereby granted, should cease, determine, and be utterly void and of no effect." Averment, that the grantee, for a space of time exceeding that specified, neglected to work the premises, contrary to the condition, and the licence thereby became utterly void:

Held, on general demurrer to the replication, that the word *void* in the proviso meant *voidable* at the election of the grantor, and, therefore, that it was necessary for the plaintiff to allege that the grantor or some person claiming under him (which it was not shewn that the plaintiff did) had by some act evinced his intention to avoid the licence.

4 Bac. 884.
7- --- 54.

granted

granted to *Bullocke*, his executors, administrators, and assigns, full and free liberty, licence, and authority to dig, mine, and search for tin, tin ore, and all other ores, metals, and minerals within, throughout, and under all that, his one third part undivided, of and in the said lands, with free liberty, licence, power, and authority to erect such engines and buildings, &c. as might be useful and convenient in the use and exercise of such several liberties, licences, &c.; and also to divert and use waters and water-courses, for the purpose of working such engines, and to make new leats for carrying off water for the like purpose; to have and to hold the liberties, licences, &c. thereby granted to the said *J. B.* &c. for the term of twenty-one years. Averment, that before the expiration of the said term, &c., to wit, on and before the times when, &c., *J. B.* made his will, and appointed one *Betsey Lovell Bullocke*, his wife, executrix, and died; that she duly took upon herself the execution of the said will, and became and was legally entitled to the use, exercise, and enjoyment of the liberty, licence, and authority so granted by the said indenture to *Bullocke*, his executors, &c. for the residue of the term. The plea then stated, that because, without committing the said trespasses, the said *Betsey Lovell Bullocke* could not, at the times when, &c. have or enjoy the said liberty, licence, and authority so fully and effectually as it was lawful for her to do, the defendant, as her servant and by her command, entered into and upon the lands in which, &c. in and upon the plaintiff's possession thereof, and committed the supposed trespasses.

Replication, that the supposed liberty, licence, and authority were granted subject to a condition, that if *J. B.* his executors, &c. should, at any time or times, neglect

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against
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against
DAVEY.

neglect effectually to work the said premises, by the said supposed indenture granted, for any time or times exceeding in the whole six calendar months in any one year of the said term, or should not work effectually such mine or mines, and the veins and lodes discovered, or to be discovered, within the said premises, unless hindered by unavoidable accident, or should fail in the performance of all or either of the covenants, &c. in the said supposed indenture contained, then, and from thenceforth, that supposed indenture, and the liberties, licences, powers, and authorities thereby granted, and every of them, should cease, determine, and be utterly void and of no effect to all intents and purposes. The replication then averred, that *J. B.* in his lifetime, and the executrix afterwards, for a space of time exceeding in the whole six calendar months, &c., neglected effectually to work the said premises by the said supposed indenture granted, he the said *J. B.* not having been during the said time hindered by unavoidable accident, contrary to the condition of the said indenture, and true intent and meaning thereof, whereby the said supposed indenture, and the said supposed liberty, licence, and authority, long before the committing of the trespasses mentioned in the plea, to wit, on the 8th *December* 1822, ceased, determined, and became and were utterly void and of no effect.

General demurrer and joinder.

Follett in support of the demurrer. The instrument set out on the record is a licence granted by *Ustwicke* before the plaintiff had any interest in the land in question; and the latter, in his replication, without connecting himself with *Ustwicke*, or shewing any authority from him,

him, or any person claiming under him, states merely that *Bullocke* had not performed certain covenants in the lease, and that the lease thereby became void. It follows, therefore, that if the license be not absolutely void, but voidable only at the option of the grantor, the replication is bad. Now *Doe* dem. *Bryan v. Banks* (a) shews that a lease with a proviso similar to that in this license is voidable only at the option of the lessor. There the lease was of coal mines for ninety-nine years, reserving a royalty rent for every ton of coals raised, and a proviso that the lease should be void to all intents and purposes if the tenant should cease working at any time for two years; and it was held that the true construction of the proviso was, that the lease was only voidable at the option of the lessor. In *Arnsby v. Woodward* (b) the proviso was, "that if the rent should be in arrear for twenty-one days after demand made, or if any of the covenants should be broken, the term thereby granted, or so much thereof as should be unexpired, should cease, determine, and be wholly void; and it should be lawful for the landlord to enter and the same to hold to his own use, and expel the lessee." It was held that this, in the event of a breach of covenant, made the lease voidable and not void; and that the landlord was bound to enter in order to take advantage of the forfeiture, and that, not having done so, he waived the forfeiture by a subsequent receipt of rent. In *Rede v. Farr* (c), there cited, it was held that such a proviso did not make the lease voidable by the lessee, on the principle that a party shall never take advantage of his own

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 against
 DAVEY.

(a) 4 B. & A. 401.

(b) 6 B. & C. 519.

(c) 6 M. & S. 121.

wrong.

1833.

 ROBERTS
 against
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wrong. If it might be determined at the option of the person in possession, the landlord might thus be deprived of the benefit of all the covenants: and if a stranger, like the plaintiff, could treat it as void, the landlord might be deprived of a beneficial rent when he and the tenant were agreed that the lease should continue. The result of the authorities is, that the difference supposed formerly to exist between leases for lives and for years, as to the necessity of an entry to avoid the lease, no longer exists. That being so, it follows that in order to avoid this licence the grantor or some one in privity with him should either have entered, or done some act shewing his intention to determine the licence.

Jeremy contra. The instrument set out upon the record, passed to the grantee no interest in the soil, but a mere easement in it. It is not a lease; but contains a mere licence to dig and search for minerals, subject to a condition; *Doe dem. Hanley v. Wood (a)*. The consideration of the grant was the render of the ores. The performance of that condition goes to the whole consideration of the grant, and, as in any case of mutual and dependent covenants, must have been averred in pleading by the grantee, for the purpose of enforcing such grant: 1 *Wms. Saunders*, 320. *d. n. 4*. Here, if there be no performance, the whole profit of the subject matter of the grant will be lost to the lord for the whole term. Then, this being a licence for a term of years, to dig for minerals, subject to a condition that it should be void on the grantee's neglecting to work the mines for the time therein mentioned,

(a) 2 *B. & A.* 724.

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it became, on such neglect, absolutely void; and not merely voidable at the option of the grantor. Even as to leases, there is a distinction in this respect between leases for lives and for years. In the former, if the tenant be guilty of any breach of the condition of re-entry, the lease is only voidable, and not determined until the lessor re-enters, or brings an ejectment for the forfeiture; but, in a case of a lease for years, it is absolutely determined by the breach. 1 *Wms. Saund.* 287. c., note 16. In the cases cited on the other side, the leases were undoubtedly for years; but they passed an interest in the land, and not as this grant does, a mere easement in it. In *Arnsby v. Woodward* (a), there was a clause of re-entry superadded to the provision for avoidance, and the Court held that both were to be construed together, as amounting only to a power of determining the lease by re-entry, and that a subsequent acceptance of the rent was a recognition of a lease still subsisting. In *Doe dem. Bryan v. Bancks* (b), a tenant attempted to insist on a forfeiture created by his own act, and thereby to convert the term into a yearly tenancy; but the Court held, that the lease did not become void, unless the landlord thought fit to make it so; and there was a subsequent receipt of rent. In *Rede v. Farr* (c), a proviso for avoidance on nonpayment of rent was held not to enable the lessee to vacate the lease; and that upon the principle that a party cannot take advantage of his own default. Here the plaintiff, who, in the pleadings, is admitted to be in lawful possession, stands in the situation of the original grantor. [*Denman C. J.* That does

(a) 6 B. & C. 519.

(b) 4 B. & A. 401.

(c) 6 M. & S. 121.

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not appear. It is consistent with the facts stated in the pleadings, that the plaintiff may be the owner of the other two thirds. *Parke J.* Possession is not sufficient, provided it be necessary that some one in privity with the grantor should have done an act to determine the licence.] No entry or claim by the grantor, or any person claiming under him, was necessary to determine this licence. A licence lies only in grant, and not in livery; and, therefore, re-entry is not necessary to determine it. There is a distinction between a condition annexed to a freehold lease and one annexed to a lease for years. A lease for life cannot commence by words without other circumstances, viz. livery and seisin, and therefore shall not be determined without entry; but a lease for years may begin by words without entry, and may be determined by words without entry, *Browning v. Beston* (a); and *Co. Litt.* 214. b. is to the same effect. And when the land itself remains in the possession of the grantor, no entry or claim by him is necessary to determine the grant. In *Co. Litt.* 218. a. it is said, "if I grant a rent-charge in fee out of my land upon condition, there, if the condition be broken, the rent is extinct in my land, because I (that am in the possession of the land) need make no claim upon the land, and, therefore, the law shall adjudge the rent void without any claim." In *Digges's* case (b) it is said to have been agreed in 20 E. 4. 18 and 19 a, that "if a feoffment be made upon collateral condition, and before the condition performed the feoffee leases it to the feoffor, if afterwards the feoffee doth not perform the condition, the land shall be in the feoffor immediately

(a) *Plowden*, 135, 136. 1 *Wms. Saund.* 287.c. note 16.

(b) 1 *Rep.* 174. 5th edit.

without

without entry or claim, *because he himself is in possession of the land*. So if a villein purchases rent which is issuing out of the lord's land, it shall be in the lord without entry or claim of the lord; for if he should make an entry or claim, it ought to be upon the land, and that is not necessary *when he himself is seised thereof*."

The necessity of an entry depends on the wording of the condition. "If the words be, that upon the doing of an act the reversioner may enter, there must be an entry to avoid the estate; but if the estate be granted upon condition that if the grantee do such an act the estate shall thereupon immediately cease and determine, then no entry is necessary:" per Bayley J. in *Fenn dem. Matthews v. Smart* (a).

DENMAN C. J. There is nothing to connect the plaintiff with *Ustwicke*, and it is possible he may have come in by title inconsistent with that of *Ustwicke*, who had only a third part in the lands. Assuming, however, that it had appeared that he represented the grantor of the licence, I think it quite clear, according to *Doe v. Bancks* (b), and on the wording of this grant, that it was necessary for him to have done some act shewing his intention to determine the licence; until such act were shewn, it continued in force.

LITTLEDALE J. The replication cannot be supported; it seems to me that, according to *Doe v. Bancks* (b), this instrument was liable to be rendered void only at the election of the grantor. If it had been a freehold lease of land subject to a condition

(a) 12 *East*, 448.

(b) 4 *B. & A.* 401.

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that it should be void on non-performance of covenants, it would have been necessary for the lessor to avoid it by entry; or, if that that were impossible, by claim. This instrument is a mere licence to dig, and did not pass the land. An actual entry, therefore, was unnecessary to avoid it; but by analogy to what is required to be done in order to determine a freehold lease, which, by the terms of it, is to be void on the non-performance of covenants, it seems to follow that, to put an end to this licence, the grantor should have given notice of his intention so to do. The giving of such notice in the case of an instrument like this is equivalent to an entry or claim by the grantor of a freehold estate to which a condition is annexed. Till such notice were given, the right of possession in those claiming under the licence was so far continued that the plaintiff, who, for any thing that appears, was a stranger to *Ustwicke*, could not take advantage of the breach of condition. If the plaintiff had set out his title, and shewn that he claimed under *Ustwicke*, the case might then be different.

PARKE J. The question is, upon the construction of this instrument, whether the grant is void, or voidable only on the default in question. If it be void, the plaintiff is entitled to judgment; if it be voidable only, then, as it does not appear that the grantor did any act amounting to an exercise of his option, the defendant is entitled. It is not necessary to decide whether the word void means voidable by entry, or voidable by any other act, shewing the election of the grantor, because in either case, *Doe v. Banks* (a) shews that a

(a) 4 B. & A. 401.

lease

lease containing such a proviso is not void at all events, and that a breach of it cannot be taken advantage of by a stranger, which the plaintiff here must be taken to be, for we cannot infer any privity between him and *Ustwicke*. He must be taken on these pleadings to be in lawful possession, but he may have been so as the owner of the other two third parts; in order to avoid the licence, it ought to have been shewn that *Ustwicke*, or somebody claiming under him, had done some act to determine it. That not being shewn, the replication is bad, and there must be judgment for the defendant.

Judgment for the defendant.

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MEAGER *against* SMITH.

Wednesday,
April 24th.

ASSUMPSIT for work and labour; money counts, and account stated. Plea, non-assumpsit. At the trial, before *Bolland B.*, at the *Glamorganshire* spring assizes, 1832, it appeared that the defendant resided near *Swansea*, and was the correspondent of Messrs. *Gautier* and *Dubois*, who were merchants residing at *Brest*. In the year 1831, a vessel belonging to Messrs. *Gautier* and *Dubois* arrived at *Swansea*, to be laden by the defendant. She was laden accordingly, but in quitting the

Defendant paid 5728 money into Court in an action for work and labour generally, where full particulars were annexed to the record. The plaintiff proved the work mentioned in the particulars to have been performed on the property of G., by the order of M.,

and gave evidence to shew that *M.* was authorized by the defendant, and also proved acts done by the latter, which it was contended were a recognition of his own liability for the work. The Judge left to the jury, whether sufficient money had been paid; whether the defendant had ratified *M.*'s order, and to what extent? The jury having found for the defendant, declared, in answer to a question from the Judge, that *M.* had no authority to bind the defendant. The Court, *Parke J.* dubitante, refused to disturb the verdict, it not distinctly appearing that the opinion last expressed by the jury was the ground of their verdict.

Held, per *Littledale* and *Parke Js.*, that payment into Court shews only a liability for some work and labour, and is merely evidence which may be coupled with other facts, so as to shew a partial or total liability on the particular claim; and that the effect of such payment is not altered in this respect by the rule of *Trin. 1 W. 4.*, which requires a particular of demand to be annexed to the declaration.

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port, she took the ground and sustained considerable damage. The vessel was repaired by the plaintiff, who now sued the defendant for such repairs. The plaintiff, in the bill of particulars annexed to the record, enumerated specifically the repairs done to the vessel, and charged the defendant with 165*l.*, and credited him with a payment of 70*l.*, the balance being 95*l.* The defendant paid 10*l.* into Court generally. In order to fix the liability upon the defendant, it was proved that a person named *Mills* had directed the repairs to be done; and evidence was given of the general connexion of *Mills* with the defendant, and of acts on the part of the defendant, which were insisted upon as shewing a recognition of his own liability in respect of the work. The learned Judge left two questions to the jury: first, whether sufficient money had been paid into Court to satisfy the balance remaining due for reasonable repairs; and, if not, secondly, whether the defendant had by his own acts ratified the order given by *Mills*, and, supposing him to have done so at all, whether the ratification extended to repairs sufficient to carry the balance beyond the amount paid into Court. The jury found a verdict for the defendant. Upon this, at the suggestion of the plaintiff's counsel, the defendant's counsel objecting, the learned Judge asked the jury, whether they considered that *Mills* had no authority to bind the defendant, or that the money paid into Court was sufficient to cover the balance due? The jury answered, that they were of opinion that *Mills* had no authority to bind the defendant. In *Easter* term 1832, *John Evans* obtained a rule to shew cause why there should not be a new trial, on the ground that the payments made were admissions of *Mills's* authority to bind the defendant;

defendant; and that, therefore, the jury had found a verdict on false grounds.

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Maule and *E. V. Williams* now shewed cause. The question was properly left to the jury. It is, however, true that if the jury had expressly found a fact inconsistent with their general verdict, the verdict could not have been supported. But it is not so if, as here, they merely find a fact which is not of itself sufficient to support the verdict. Besides, the payment into court is not conclusive evidence of the liability or authority. In cases where the declaration sets out a special contract, the defendant has express warning as to the nature of the claim, before he pays the money into court. But it could not be maintained that, if the declaration contained only a common count for goods sold and delivered, and money were paid into court, the plaintiff might establish a case by simply shewing that some goods were delivered to a third party. It will be said that, in the present case, only one claim has been shewn to exist, and that the payment must be applied to this one. But suppose work and labour had been performed for the defendant four or five years ago, to the amount of the 10/., the payment might have been made with respect to that work. The plaintiff cannot use the payment as conclusive proof of the defendant's liability for any work which the plaintiff may have performed at any time or place. It might as well be treated as proof of the execution of any written special agreement which the plaintiff might allege to have been made. Besides, there are two questions here; first, whether the defendant be liable at all, and, if he be, then,

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secondly,

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secondly, to what extent he is liable. At most, the payment of the 10*l.* admits the liability to that extent only. In *Seaton v. Benedict* (a), Gaselce J. says "Payment into court generally, in *assumpsit*, admits nothing beyond the amount of the sum paid in. Where, indeed, there is a special contract, the payment into court admits that contract; but where, as in the common *indebitatus assumpsit*, the demand is made up of several distinct items, the payment admits no more than that the sum paid in is due." The plaintiff might have authorized repairs to the extent covered by the 10*l.*, or he might mean, although not actually liable, to assent to a liability to that extent; but, beyond that, to recur to his legal rights. And the jury may have answered the question in either sense. As to the payment for which the plaintiff gives credit in his particulars, the 70*l.* is not shewn to have been paid by or on behalf of the defendant; and, even if that were shewn, he might have paid it as agent of *Gautier* and *Dubois*. But in fact the giving of the credit amounts only to an admission on the part of the plaintiff.

John Evans and *Whitcombe* contra. The defendant, by his payment into Court, admits that there was something due upon the repairs; and all that the jury ought to have considered, was the amount due. Such a case as this must, since the late rule of Court (b), be treated exactly as if the declaration set forth the items contained in the bill of particulars, the latter being now a part of the record. The language used by *Tindal* C. J. in *Macarthy v. Smith* (c), shews that the parties go to

(a) 5 *Bing.* 32.(b) *Trin.* 1 *W.* 4. 2 *B. & Ad.* 788.(c) 8 *Bing.* 146.

trial upon the understanding that the complaint on the record amounts to neither more nor less than the claim made in the bill of particulars. The direction of the learned Judge is also wrong. He left it to the jury to say whether there was a liability beyond the sum paid. But there could not be a shifting liability; the defendant must have been liable to the whole demand or to no part of it. Again, the direction to the jury was such as to induce them to suppose that the defendant's liability rested simply on *Mills's* right to bind him; whereas there were independent acts shewn to have been done by the defendant which of themselves amounted to a recognition of liability.

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DENMAN C. J. This rule must be discharged. I think, substantially, all the material points were submitted to the jury. I had rather, indeed, that it had not been left as a question whether *Mills* had any authority at all to bind the defendant, because there were acts of recognition independent of any thing done by *Mills*, which tended to shew the defendant's liability. But it was very proper that the jury should be desired to consider whether that authority extended beyond the sums paid. And, if it did not go beyond that, then it became a proper question whether, and how far, the defendant by his own acts had made himself liable to the demand. These questions were all, in substance, left to the jury, and they found a verdict for the defendant. After the verdict, the jury, in answer to the question put, negatived the authority of *Mills* altogether. But it does not follow, that the jury founded their verdict upon this belief; it may have rested upon one of the other grounds. Where a verdict is returned upon a proper summing up,

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and an endeavour is made afterwards to disturb that verdict by reference to something which has operated on the minds of the jury, it must be shewn distinctly that they went upon that in giving their verdict. Here that is not the case.

LITTLEDALE J. I am of the same opinion. The payment of money into Court may, under some circumstances, amount to an admission of liability. It cannot be construed only as a purchase of peace, unless there be a stipulation of that sort at the time of the payment; which does not take place when money is merely paid into Court. In that case it amounts only to a formal admission of the defendant by his attorney, that so much is due on a claim of the nature expressed in the declaration; that is, in the present case, for work and labour. It is no more an admission of liability than if a payment had been made on a similar account before action brought. In the present case, it did not necessarily follow from the payment that this work and labour should have been performed upon the vessel. Nor did it shew a liability of any sort beyond the sum paid in. Now the liability, according to the case on behalf of the plaintiff, rests, not in any interest of the defendant in the vessel repaired, but in directions given by him. So that it becomes material to ascertain, whether the admission of liability extends to the whole, or to how much of the claim. It may appear, either that there was an authority to the extent only of the money paid, or that there was an authority to the whole extent of the work performed. The defendant might be willing to undertake a liability for a partial repair, though not for a general one. That is a question for the jury. It is, however,

however, urged on the part of the plaintiff that, since the new rule, the case must be treated as if the particulars of demand were a part of the declaration; for instance, as if the declaration had alleged certain work performed on the bowsprit, and so on. I cannot agree to this, so far as regards the effect of payment of money into Court. It might be that the full particulars were not originally annexed to the record, and in that case, there being only a claim for work and labour in the first instance, the defendant might choose to admit that he owed 10*l.* for some work and labour, and pay that sum into Court, and afterwards might demand full particulars, which, when delivered, might contain what he considered new causes of action. For this reason, I think it safer to adhere to the rule, that the payment of money into Court does not bind the defendant to admit the particulars of the demand, and that the particulars are not necessarily connected with the payment. I am of opinion, therefore, that the question was properly left to the jury. The liability would be established by *Mills* having authority, or, in default of that, by the defendant ratifying the engagement; and, if the liability existed, the question would be, how far it extended.

PARKE J. I am not satisfied that the jury have found their verdict on the right ground; and, if the matter depended upon me, I should send the case to a second trial. The jury, in answer to the question put to them after the verdict, negatived *Mills's* authority, and from the mode in which the question was put, and their answer to it, I should infer that they founded their verdict altogether upon *Mills's* want of authority; whereas it is clear, that he might have had none, and yet the

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defendant have been liable to their demand. Under these circumstances, I should have wished the case to have gone to a second trial, that the jury might have decided upon both questions; first, whether *Mills* had authority to bind the defendant; and secondly, in default of that authority, whether the defendant had rendered himself liable, by his own acts, to a greater amount than the money paid into Court. With regard to the effect of payment of money into Court, there is no doubt, but that if such a payment is made on a count alleging a special contract, it operates as an admission of that contract: if on a general indebitatus count for work and labour, or the like, on which the plaintiff might recover for one or more distinct contracts, it operates as an admission of a liability to that amount, on some one or more of such contracts: its effect, in both cases, is the same as if a payment had been made by the defendant to the plaintiff of the like sum before action brought. But in that case, supposing it had clearly appeared in evidence, that there was in reality one entire indivisible contract in question between the parties, to which the payment must necessarily be referred, such payment would have operated as an admission of that contract, leaving it open to the defendant to make out his defence as to the unsatisfied part of it: and, in like manner, the payment into Court on a general indebitatus count for several things, may, I conceive, in some cases, coupled with the evidence, have the effect of an admission of a particular contract. I do not mean to say, that the payment would have had that effect in the present case: but as the only transaction in question between the parties was, the demand for the repairs of the ship on one particular occasion, the payment of money into
Court

Court would certainly have had the effect of an admission of liability to *a part* of that demand: the defendant being at liberty to contend that he had not made himself liable beyond that amount. I cannot help thinking, that the jury have proceeded on a wrong ground; and that they have not taken into consideration at all the acts of the defendant as tending to establish his liability, but that they have enquired only whether *Mills* was the agent of the defendant; and assumed that, unless he were, the defendant would not be liable. On that account a new trial would have been more satisfactory to my mind.

Rule discharged.

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EVERETT *against* YOUELLS.

Wednesday,
April 24th.

THIS was an action of assumpsit, on a warranty of sheep, tried before *Vaughan B.* and a special jury, at the *Norfolk* spring assizes, 1832. The verdict was for the defendant. *Storks Serjt.*, in *Easter* term 1832, (*April* 19th), moved for a rule to shew cause why there should not be a new trial (*a*); first, on the ground that the verdict was against evidence; and secondly, on affidavits. By the first of these, it appeared that the trial began in the afternoon of *Friday*, the 23d of *March*, and occupied the rest of that and all the following day; that on *Saturday* evening, at eight o'clock, the jury retired from the box to consider their verdict,

The delivery of food to a juryman, after the jury were shut up to consider of their verdict, is no ground for setting the verdict aside, if it do not appear that such refreshment was supplied by a party to the cause, or that it was delivered to a juryman, whose holding out decided the event.

Admissible as to matters which pass openly in Court, but where there is a Judge's report on the same points, that is conclusive.

Affidavits of juryman are Judge's report on

4 BAC. 576.

(a) Before Lord *Tenterden C. J.*, *Littledale*, *Parke*, and *Patteson Js.*

and,

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and, not agreeing, were shut up till the following morning; and that about three hours after they were shut up, a servant of *J. A.*, Esq., the foreman, conveyed a sandwich to him by stratagem. The second affidavit (by the plaintiff's attorney), stated the deponent's information and belief, that about ten o'clock on the *Sunday* morning, the jury had an interview with the Judge, who, then observed to them on the subject of their verdict, "that concession ought to be made by the minority to the majority;" shortly after which, they agreed to find for the defendant; and the deponent said he was informed and believed, that in consequence of the Judge's explanation, and of exhaustion for want of victuals, three jurymen whom he named, (not including *J. A.*) were induced, though against their inclination, to yield up their own opinion and agree with the rest of the jury to find for the defendant. *Storks* Serjt. also proposed to put in affidavits of two of the jurymen to a similar effect with the last. [Lord *Tenterden* C. J. I doubt whether these are admissible.] They do not come within the decided cases, where jurymen have offered to allege their own misconduct; and a ground is laid for receiving them, if the Court be of opinion that the verdict was against evidence.

LORD TENTERDEN C. J. The delivery of food to the foreman might be ground for imposing a fine, but it is not a reason for setting aside the verdict. It does not appear that the food was supplied by a party to the cause, nor on which side the jurymen who received it, was at the time; that one jurymen only held out; or that the delivery of refreshment to the one who held out turned the event of the trial. Unless the affidavits

affidavits would shew that this refreshment had the effect of carrying the verdict, they would not support the rule (a).

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573 b. 2d. 2187

LITTLEDALE J. concurred.

PARKE J. The officer who attended the jury may be punishable for neglect; but it would be a fearful thing if verdicts could be set aside on such grounds as this.

PATTESON J. concurred.

The rule, therefore, as to this point, was refused; but a rule nisi was granted on two of the grounds stated; one of them being the alleged misdirection of the learned Judge, which was said to have influenced a part of the jury:—Lord *Tenterden* at the same time observing that the statements on this point might, perhaps, go the length of shewing that the verdict was not that of the whole jury; but that this would be a very dangerous ground to act upon in setting aside a verdict.

The report of the learned Judge was now read; by which it appeared that the expressions he had used were different from those ascribed to him. *Kelly* and *Austin*, in support of the rule, were stopped by the Court.

F. Pollock and *Storks* Serjt., *contra*, adverted to the affidavits of the two jurymen; contending (which was denied on the other side) that the Court, on the former occasion, had permitted them to be filed. [*Parke* J. We cannot hear these affidavits.] A jurymen is competent

(a) See *Co. Litt.* 227 b. *Dunc. Trials per Pais*, 8th edit. 248—252.

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YOUNG.

to state on affidavit what passes publicly in presence of the Court.

Per Curiam. (a) We cannot receive statements from the jury to shew on what grounds they acted. Affidavits of jurymen may be admissible, to shew what questions they put to the judge (though that would come better from any other source), or they may be used to supply the defect of notes by counsel: but when we have the Judge's own statement, that is a better authority.

The Court, therefore, being of opinion that on the report there appeared no misdirection, nor any ground for saying that this was not the verdict of the whole jury; and that on the other point there was no reason for disturbing the verdict, the rule was

Discharged.

(a) *Denman C. J., Littledale and Parke Js.*

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The KING *against* The Justices of the West Riding of YORKSHIRE. *Thursday, April 25th.*

(In the Matter of BOWER.)

A RULE nisi had been obtained for a mandamus to the justices of the West Riding to enter continuances upon, and hear, the appeal of *Joshua Bower* against certain orders of two justices for diverting certain public footways in the township of *Middleton*, in the parish of *Rothwell*, in the said West Riding. The orders were three in number, all dated the 28th of *May* 1832; and *Bower*, on the 25th of *June* 1832, gave notices of appeal against each of the orders, and, among other objections, the following was stated in every notice. "Because, if the said order should stand, and the said road be stopped up, the appellant and his tenants, occupiers of a certain farm, lands, &c., near adjoining the said road, and who have heretofore used, and have a right to use, the same, and also other persons, and the public, would be put to great inconvenience." The notices did not otherwise state that the appellant was aggrieved by the orders.

In a notice of appeal against an order for stopping up a footway (under 55 G. 3. c. 68. s. 3.) it sufficiently appears that the appellant is a party aggrieved, if it be stated that he and his tenants, occupiers of a farm and lands near the said way, and who have heretofore used, and have a right to use it, and also other persons, and the public, will be put to great inconvenience.

The statute requires "ten days' notice" of an appeal to the sessions

against such order. By a rule of the West Riding sessions, in cases of appeal "not otherwise directed by law," ten days' notice is to be given, exclusive of the day of notice and first day of the sessions: Held, that the statute meant ten days' notice, one inclusive and the other exclusive; that the sessions rule did not apply to this case, or if it were intended to do so, this Court would use its discretionary power of controlling the practice.

The appellant gave notices of appeal against three orders, all of the same date; he attended the clerk of the peace to enter them, and the entry was in the following form. "A., appellant against an order of B. and C. Esquires, dated, &c. for stopping up footways in," &c. He paid the fee as upon one appeal. At the sessions, the appellant's counsel being called upon by the other side to elect which appeal he would proceed with, proved his notices upon one, which was dismissed on a supposed defect of notice, and the order confirmed, as were the two others, nothing being said of the appeals against these, to which the same objections would have applied. On motion for a mandamus to enter continuances and hear the appeals, it appearing that the preliminary objection taken was unfounded, and that the appellant had in reality intended to enter his appeal against all the orders, this Court made the rule absolute as to all three.

The 4 Bac. 222.

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of YORKSHIRE.

The next quarter sessions for the West Riding were held on the 5th of *July*; on which day the appellant's attorney entered an appeal with the deputy clerk of the peace, in the following form — “*Joshua Bower*, appellant against an order of *J. A.* and *J. I.* Esqrs. for stopping up footways in the township of *Middleton*, dated 28th *May* 1832.” And he paid the fee which is usual for entering one appeal, the deputy clerk of the peace not being apprised at the time that more than one order was in question (*a*). The three orders being, on the same day, returned to the sessions, the respondents' counsel called on the counsel for the appellants to elect which case he would enter upon; and he proceeded to prove his notices of appeal against the order which stood second. An objection was taken, but over-ruled, that the notice did not state the appellant to be a party aggrieved. It was then objected that there had not been ten days' notice of appeal according to the rules of practice of these sessions; one of which is as follows: — “*Appeals.* In all cases of appeals not otherwise directed by law, ten days' notice in writing shall be given by the party appealing, his, her, or their attorney or solicitor, exclusive of the day of service and the first day of the sessions or the adjournment to which the appeal is intended to be made.” The Court held this objection valid, and dismissed the appeal and confirmed the order. They also confirmed the other two orders, no appeal against them being entered upon, nor any evidence offered of service of notice as to them.

(*a*) The attorney for the appellant swore that he served the notices of appeal, and “as such attorney did duly enter the said appeal at the clerk of the peace's office.”

Blackburne

Blackburne and *Dundas* now shewed cause. This is a notice given under the statute 55 G. 3. c. 68. s. 3. which enacts that in case of a footway being stopped up by order of justices, it shall be lawful for "any person injured or aggrieved by any such order or proceeding," to appeal to the justices at the quarter sessions next after the expiration of four weeks from the first publication of notice of such order, "upon giving ten days' notice in writing of such appeal to the surveyor of the highways," &c.; and the said court of quarter sessions is thereby authorised and empowered to hear and finally determine such appeal. First, the fact of the appellant being a party aggrieved, is not shewn with the certainty which appears to be requisite on a comparison of the cases, *Rex v. The Justices of Essex* (a), *Rex v. The Justices of the West Riding* (b), *Rex v. The Inhabitants of Blackawton* (c). Secondly, there was not ten days' notice according to the construction which the sessions have determined should be put upon those words in the statute. By the expressions there used it was left open to them to decide whether the ten days should be exclusive or inclusive, and they, to prevent disputes, have established a rule, which ought to have been observed. Thirdly, one appeal only was entered or proceeded upon; on two others the orders were confirmed, and as to these at least there is no ground for the application.

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Follett contra. It is clearly shewn by the notice, though not stated in terms, that the appellant is aggrieved; on this point, therefore, the language of the

(a) 5 B. & C. 431.

(b) 7 B. & C. 678.

(c) 10 B. & C. 792.

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Court in *Rex v. The Justices of the West Riding* (a), and *Rex v. Blackawton* (b), is expressly in his favour. [Denman C. J. We do not think any thing of that objection.] As to the second point, even the rule of the sessions only requires ten days' notice, exclusive of the day of service and first day of the sessions, in those cases *where it is not otherwise directed by law*. Here the statute requires ten days' notice; the proper construction of which, according to the general rules of law, is, that one day shall be reckoned exclusively and one inclusively. That mode of construction is adopted in the new rules of Court, *Hil. 2 W. 4. (c)*, and was recognized in some degree in *Pellw v. The Hundred of Wonford* (d), as applicable where the computation is made from an act done by the party against whom the time runs. That is so here. If the sessions intended, by their rule of practice, to require ten days' notice exclusively, where a statute only prescribes "*ten days' notice*," the question then will be, whether the justices ought to have acted upon such a rule, and if not, this Court will exercise its discretionary power of controlling their practice, as in *Rex v. The Justices of Wilts* (e), and *Rex v. The Justices of Lancashire* (g). As to the third objection, it is not denied that there were notices of appeal against three orders: the appellant was called upon in Court to elect on which appeal he would proceed; and when one had been dismissed in the manner stated, it became useless to proceed with the others.

DENMAN C. J. I am of opinion, that this rule must be made absolute. As to the last objection, the omis-

(a) 7 B. & C. 678.

(b) 10 B. & C. 792.

(c) 3 B. & Ad. 393.

(d) 9 B. & C. 134.

(e) 10 East, 404.

(g) 7 B. & C. 691.

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sion to proceed on the appeal to the first and third orders is explained by the decision of the Justices on the second : and it appears sufficiently on the affidavits that the attorney meant to tender his appeals to be entered against the three orders. With respect to the second point, the rule of practice at the sessions is inapplicable here ; for it applies only to “ cases of appeals not otherwise directed by law.” Here it is directed by the statute that there shall be ten days’ notice of appeal to the sessions, and that, according to the practice of the superior courts in other cases where such notice is required, must be taken to mean that one day shall be reckoned inclusively and one exclusively. It was not competent to the sessions to impose such a rule as is here contended for ; if they meant it to be applicable to this statute, they have misconstrued the clause in question ; but it seems to me that they have merely left the act as they found it. On the first point their decision was right.

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LITTLEDALE J. The words “ ten days’ notice” in 55 G. 3. c. 68. s. 3. must be construed as such words are in other cases, and are not affected by the rule of the sessions. It does in this case sufficiently appear by the words of the notice that the appellant is a party aggrieved ; the allegation of inconvenience to the public in general, is an addition which make no difference.

PARKE J. If the time of notice was already fixed by law, the rule of sessions does not interfere with it ; and if the rule were intended to have that effect, this Court might exercise a control over it. The act

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says there shall be "ten days' notice" of appeal to the sessions, and the Court cannot adopt a better rule for construing the words than that which has been already adopted in similar cases. If the legislature had intended a different practice to be followed in this instance, they would probably have said "ten clear days." With respect to the appeals against the several orders, it seems that the intention of the appellant was to enter his appeals against all the orders. If that was not done, there is nothing to shew that it was his fault. On the first point, I think the decision of the justices was right.

Rule absolute.

Thursday,
April 25th.

EX parte BATTINE, LL.D.

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r. 151
A pension during his Majesty's pleasure, granted by order in council on petition, for past services as advocate of the admiralty, and charged on the navy estimates, may be appropriated, under the insolvent act 7 G. 4. c. 57. s. 29., with the consent of the lords of the admiralty, for payment of creditors.

Quære,
Whether this

Court could have granted a prohibition to the insolvent debtors' court against proceeding upon an order for such appropriation, if it had not been warranted by the statute?

A RULE had been obtained, calling upon the Commissioners of the Insolvent Debtors' Court to shew cause why a prohibition should not issue to the said court against proceeding on an order made by them on the 17th of *November* 1831, for the assignment of part of a certain pension of 200*l.* per annum granted to *William Battine*, LL.D. by the Prince Regent in council on the 8th of *May* 1812, and held by the said *William Battine* during His Majesty's pleasure; and from making any order, or taking any proceedings for assigning any part of such pension. The material facts stated on affidavit for and against the rule were as follows: —

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In *March* 1812, the Prince Regent, by order in council, referred to a committee of the privy council a report from the Lords Commissioners of the Admiralty upon a certain memorial of the above mentioned Dr. *Battine*, late His Majesty's advocate general in his office of Admiralty. The memorial stated, that Dr. *Battine* had been superseded in his office, and prayed some provision on retirement in remuneration of his past services during twenty years. The Lords of the Admiralty had in their report submitted, for reasons assigned by them, whether it would be proper to grant any pension, but recommended that such pension, if granted, should not exceed 200*l.* per annum. Upon this report the committee of privy council, on the 8th of *May* 1812, represented to the Prince Regent in council that it might be advisable to grant Dr. *Battine*, in the name and on the behalf of His Majesty, a pension of 200*l.* per annum to commence from the day he ceased to hold his office, and to be charged on the ordinary estimates of the navy; and on the same 8th of *May* the Prince Regent, by and with the advice of the privy council, approved of the proposal made by the committee, and ordered that the said pension should be granted, to commence and to be charged as recommended by the committee; and the Lords of the Admiralty were, by that order, required to give the necessary directions.

On the 17th of *November* 1831, Dr. *Battine* was discharged from custody under the Insolvent Debtors' act, 7 G. 4. c. 57. and executed the usual warrant of attorney. Before his discharge it was determined by the Court that the annual sum of 180*l.*, part of the said pension, should be paid to the assignees of the

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insolvent's estate, to be applied in discharge of the debts till that Court should further order; and they communicated to the Lords of the Admiralty their intention to make an order to that effect, if, upon receipt of their communication, the said Lords should consent thereto in writing, according to the statute. The Lords of the Admiralty consented. A similar communication was made to the commissioners of the navy, and assented to by them.

In answer to an enquiry made by the clerk of the Insolvent Debtors' Court (with reference to the present proceeding) Mr. *Barrow*, the Secretary to the Admiralty, stated the nature of Dr. *Battine's* pension as follows:—

“Dr. *Battine's* pension of 200*l.* per annum, enjoyed under this department, is a naval pension for civil services, namely, as advocate of the admiralty. It is charged, like all other civil naval pensions, on the ordinary estimate of the navy, is paid by the treasurer of the navy by warrant from this department; and differs in no respect from any other naval pension for civil services, except in its amount being larger than is authorized by the act 50 G. 3. c. 117.; which required that it should be sanctioned by His Majesty's order in council.”

Dr. *Battine* denied that the pension was one which the Insolvent Debtors' Court could legally appropriate in the manner directed by 7 G. 4. c. 57. s. 29. (a)

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(a) 7 G. 4. c. 57. s. 29. “Provided always, and be it further enacted, that nothing in this act contained shall extend to entitle the assignee or assignees of the estate and effects of any such prisoner, being or having been an officer of the army or navy, or an officer or clerk, or otherwise employed or engaged in the service of His Majesty, in the customs or excise, or any civil office, or other department whatsoever, or being or having been in the naval or military service of the *East India* Company, or an officer or clerk, or otherwise employed or engaged in the service of the Court

The *Solicitor-General* and *F. Pollock* now shewed cause. Even assuming that the Insolvent Court has acted erroneously, this Court ought not to interfere in the manner proposed. The Court below may be in error, and their proceeding void; but that is not of itself ground for a prohibition. [*Parke J.* Not if they had authority to decide the point as to the pension being assignable. But if they had not, this Court may control them.] The same reasoning would have been applicable in *Ex parte Cowan (a)*, where, however, the Court did not decide that a prohibition lay to the *Lord Chancellor* sitting in bankruptcy. If the present case is not within the proviso made by sect. 29. of the act, the pension is wholly subject to the authority of the Court below; and there is no other excep-

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Court of Directors of the said company, or being otherwise in the enjoyment of any pension whatever under any department of His Majesty's government, or from the said Court of Directors, to the pay, half pay, salary, emoluments, or pension of any such prisoner, for the purposes of this act: Provided always nevertheless, that it shall be lawful for the said Court to order such portion of the pay, half pay, &c. of any such prisoner, as on communication from the said Court to the Secretary at War, or the Lords Commissioners of the Admiralty, or the Commissioners of the Customs or Excise, or the chief officer of the department to which such prisoner may belong or have belonged, under which such pay, half pay, &c. may be enjoyed by such prisoner, or the said Court of Directors, he or they may respectively, under his or their hands, or under the hand of his or their chief secretary, or other chief officer for the time being, consent to in writing, to be paid to such assignee or assignees, in order that the same may be applied in payment of the debts of such prisoner; and such order and consent being lodged in the office of the paymaster of His Majesty's forces, &c. or of any other officer or person appointed to pay, or payng. any such pay, half pay, &c. such portion of the said pay, half pay, &c. as shall be specified in such order and consent, shall be paid to the said assignee or assignees, until the said Court shall make order to the contrary."

(a) 3 B. & A. 123.

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tion in the act to limit it. [*Parke J.* That is so, if the clause operates merely as an exception to a general power which the Commissioners possess under the act; but, if the act gives them only a special authority over pensions, while it confers a general power over other kinds of property, may we not be entitled to restrain them if they exceed the limited authority?] It is for them to determine whether the particular instance falls within their jurisdiction; and if they are wrong, it is not a ground of prohibition, as if they had taken cognizance of a subject matter altogether out of their province. The eleventh section of the act gives a general power over the insolvent's estate; the twenty-ninth restrains that power; but it is for the Commissioners to interpret the restricting clause. Unless they are to do so, how are they to make the orders which that section requires? and it cannot be said that as often as they make an order not warranted by the act, the jurisdiction is exceeded. This order has been made, subject to the assent of the admiralty, as directed by sect. 29. If the section did not apply, the pension was disposable for the benefit of the creditors without such assent. Besides, the proceeding was taken by the Court with the consent of the party himself, for his own benefit as well as for the promotion of justice; and is, therefore, valid, even if there was, strictly, no jurisdiction to make the order.

Follett, contra. A mere pension during pleasure, as this is, would not pass by the general assignment under sect. 11. Neither is it reached by the proviso in sect. 29. That applies only to pensions held under any department of His Majesty's government. This is not

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so held, but is merely an allowance granted at the will of the Prince Regent on the petition of the party. There is no doubt that if the Court below was acting within its jurisdiction, a prohibition would not lie, but here no jurisdiction exists, unless it be given by the twenty-ninth section. The nature of the pension, and the mode in which it is granted, render that section inapplicable. [*Parke J.* You say this is not a pension under any department of His Majesty's government; but the Lords of the Admiralty are to execute the order in council for the payment.] Still, the question is, whether this be a pension held under the Admiralty; being granted by order in council, merely at the royal pleasure. It is a matter of favour only; and differs altogether from pensions for services, held by vote of parliament, pursuant to the several acts which regulate such pensions. For instance, in 50 G. 3. c. 117. ss. 2. and 3., the former kind of pension is expressly distinguished from the latter. It is not subject to the same regulations and deductions. The pension voted by parliament under that act is in the nature of a continued pay; it is fixed by reference to the salary which the party enjoyed in his office, and to the length of his service; and where granted in the offices of the Secretary at War, Master-general of the Ordnance, or Lords of the Admiralty, it is returned with the estimates of that department. But the pension granted by the King in council has nothing analogous to pay. [*Parke J.* Would not sect. 11. pass every kind of pension, but for sect. 29. ?] It would not pass an officer's half pay, *Flarty v. Odium* (a). [*Parke J.* That was under a differently framed act. Here it is

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(a) 3 T. R. 681.

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argued, from the restraining section, that whatever is not within that, was meant to pass by sect. 11.] It could not have that effect if the pension did not come within the descriptions of property enumerated in sect. 11. As to the supposed assent of the insolvent, if he did what was required by the Insolvent Court as a condition of his discharge, that is no bar to the present application, if the matter was wholly out of the jurisdiction of that Court.

DENMAN C. J. Without touching upon the very important general question, whether or not a prohibition would lie to the Insolvent Court against entering upon a case of this kind under other circumstances, it is sufficient to say here, that I think this pension is clearly within the twenty-ninth section of the act. The eleventh section, *primâ facie*, would pass all those matters which are afterwards made the subject of exception in sect. 29. Then, by that section, a proviso is introduced, that nothing in that act shall extend to entitle the assignees of the estate of any such prisoner, "being, or having been, an officer of the army or navy, or an officer or clerk, or otherwise employed or engaged, in the service of His Majesty, in the customs or excise, or any civil office or other department whatsoever, or being otherwise in the enjoyment of any pension whatever under any department of His Majesty's government, to the pay, half-pay, salary, emoluments, or pension of any such prisoner, for the purposes of this act:" but, nevertheless, that a part of such pay or pension may be appropriated to the purposes of the act, by arrangement made with the heads of the department, as is directed in that clause. I think, in this case, there is no doubt that the insolvent

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was a person who had been employed in the service of His Majesty in a civil office, and was in the enjoyment of a pension under a department of His Majesty's government. The Privy Council recommended the grant to the Prince Regent, to commence from the day when Dr. *Battine* ceased to hold his office, and to be charged on the ordinary estimates of the navy. The order in council passed accordingly, and the Lords of the Admiralty were required to give the necessary directions. Here, then, is a pension, held under such a department, and by such a person, as are expressly named in the twenty-ninth section. Giving that section a reasonable and ordinary construction, I think it is clear that the pension was such as might, with the consent which the act required, be assigned for the benefit of the creditors.

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LITTLEDALE J. I am of the same opinion. The insolvent had certainly been a person employed in a civil office in the naval department of His Majesty's government, and enjoyed a pension under that department. The commissioners, therefore, might properly make the order for paying over a part of it, with the assent of the Lords of the Admiralty. As to the power of this Court to grant a prohibition to the Insolvent Debtors' Court, it is not necessary to express any opinion.

PARKE J. It is unnecessary to say whether or not such a pension as this would pass under the general assignment directed by section 11.; I think it is clearly within the proviso of section 29., as granted to a person who had been in His Majesty's service in a civil office, and held under, and included in the estimates of a department of His Majesty's government.

Rule discharged with costs.

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Thursday,
April 25th.

The KING *against* DONNISON and Another.

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The rule established at nisi prius in prosecutions for libel in a newspaper, viz. that after production of the stamp-office affidavit, a paper corresponding with it in title, printer's and publisher's name, and place of publication, may be put in and read as published by the parties therein named, without other proof on this point, applies equally on motions for criminal information.

670. J. 204.

A RULE nisi had been obtained for a criminal information against these parties for misdemeanors in printing and publishing certain scandalous libels. The rule was drawn up on reading the affidavits of the Earl of *Lonsdale* and other persons, and a paper partly written and partly printed, thereto annexed (a), and the several printed papers thereby referred to. Upon cause being shewn, it appeared that some newspapers, entitled "*The Whitehaven Herald*," published at *Whitehaven*, and bearing the names of the printer and proprietor, had been put in with (though not annexed to) the affidavits; but the latter consisted merely of the usual copy of the stamp office affidavit (that the defendants were the printer and proprietor of a newspaper called, &c. and intended to be published at *Whitehaven*), and depositions by the Earl of *Lonsdale* and other persons, denying that the Earl had been guilty of particular acts of misconduct; as peculation, breach of certain trusts, entertaining ruffians at his table, &c. They did not in any more direct manner refer to the newspapers or any part of them, nor did they charge the defendants or any other person with having asserted or published the matters stated to be untrue; but the newspapers did, in fact, contain such imputations upon the Earl.

Armstrong now shewed cause. The rule must be discharged, for the affidavits do not, either directly or

(a) The stamp office affidavit.

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by reference, impute any offence to the parties against whom this motion is made. The rule states that the printed papers are referred to by the affidavits, but that proves not to be the case; they make no reference to any paper or passage. The act 38 G. 3. c. 78. does not meet this objection; that merely gives facilities in proving who are the printer and proprietor. [*Follett*, *amicus curiæ*, mentioned the case of *Rex v. Featherstone*, editor of *The Western Times* newspaper, in Trinity term 1830, where the present objection was taken, and the Court enlarged the rule, in order that supplemental affidavits might be made (a).]

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The King
against
Dennis.

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Sir *James Scarlett* and *F. Pollock* contra. On applying for the rule, the stamp office affidavit was produced, and newspapers were put in, corresponding with it in title, place of publication, and printer's and publisher's names. That by 38 G. 3. c. 78. s. 11., was sufficient proof that the papers in question had been printed and published by the defendants; and the rule is drawn up "on reading the printed papers," which shews that the libellous matter was read to the Court on moving for the rule.

Per Curiam (b). As soon as the stamp office affidavit is proved, the statute enables the prosecutor to put in a newspaper corresponding with it, and to use such paper as evidence against the defendant (c). That is the rule at nisi prius, and by parity of reasoning it

(a) In the affidavits afterwards made, one deponent stated that he had read the libellous matter in a certain paper, &c. and another expressed his belief that it referred to the party complaining.

(b) *Denman C. J.*, *Littledale* and *Parke J.*

(c) *Mayne v. Fletcher*, 9 B. & C. 382.

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The King
against
DONNISON.

should be so here. If no other cause is shewn, the rule must be absolute.

Rule absolute (a).

(a) But quære, (although the newspapers were properly before the Court as evidence against the defendants), whether the affidavits ought not to have specifically pointed out the libellous matter complained of, and which the prosecutor's affidavits were intended to contradict.

Friday,
April 26th.

ELIZA KELLY *against* JOHN PARTINGTON.

Ad. 446 A master in giving the character of his late servant to a person intending to take her, charged her with theft; and in support of that charge, stated, that she had borrowed money when she came into his service, and repaid it before she received any wages. In reply to an enquiry made afterwards by a relation of the servant, he admitted that the time when he paid the wages was entered in a book, which he produced, but refused to state what the time was; and on the same party remonstrating, and observing that the servant, in consequence of her loss of character, might have gone upon the town, he answered, "What is that to us?"

CASE for words imputing theft, with an averment that one *James Stenning*, in consequence of the words, refused to take the plaintiff as a shop-woman. At the trial before *Patteson J.* at the sittings in *Middlesex* during this term, it appeared that *Stenning*, who was going to take the plaintiff into his service, enquired her character of the defendant, to whom she had been shop-woman; and the defendant, on that occasion, charged her with having secreted money taken from his till, and also stated that when she came into his service she borrowed half a sovereign of her mother, and that before she had been there two months, and before she received any wages, she paid her mother the money, and made her a present of a sovereign. The plaintiff's brother-in-law deposed that he afterwards called upon the defendant for an explanation of the words, when he repeated the same charges. The witness, with reference to the latter statement, observed that the defendant, no doubt, made entries in some book, of the times at which

Held, that this conduct was evidence to go to the jury (though slight), that the communication to the intended master was made maliciously.

1 Bac. 198.

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he paid his servants' wages, and that on reference to it he would probably find that he was mistaken in what he had asserted. The defendant then went to his desk, took out a memorandum book, and looked at it; after which he turned to the witness, and asked, "Do you know when she received her wages?" the witness answered "No;" but he would go by the defendant's account, as that was likely to be correct. The defendant then said "If you do not know, I am not going to tell you," and put the book into the desk again. The witness upon this made some allusion to intended proceedings at law, and said he considered the case of theft as trumped up; to which the defendant made no answer, but "grinned" in a contemptuous manner at the witness; and upon his remonstrating, and observing that if the plaintiff had not had friends, she might have gone upon the town, the defendant said (speaking of himself and his wife) "What is that to us?" Evidence was then given in contradiction of the defendant's statement as to the time when the plaintiff repaid the halfsovereign. Upon this case, Sir *James Scarlett*, for the defendant, submitted that there was no ground of action, inasmuch as the words spoken to *Stenning* were a privileged communication to a person enquiring the character of a servant; and those to the brother-in-law were spoken to an agent of the plaintiff by way of explanation, which he had called for on her behalf; and there was no proof of express malice. *Patteson J.* refused to nonsuit, but reserved leave to move; and the defendant having given some evidence to shew grounds of suspicion on his part, a verdict was found for the plaintiff, damages one shilling.

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against
PARTINGTON.

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against
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Sir *James Scarlett* now moved to enter a nonsuit, and contended that, on the above facts, there was no evidence to go to the jury of express malice. In *Child v. Affleck* (a), the case of malice was much stronger; but the plaintiff was nonsuited, and this Court held the direction right.

DENMAN C. J. Where it is clear that the words complained of are nothing more than a communication from one master to another, informing him of the character of a servant, the case certainly ought not to go to a jury. But where there are other circumstances from which malice may be inferred, the question is for them to decide. Here there were such circumstances, though very slight; namely, the refusal to point out an entry in a book, when that became the means of proving or disproving a charge which the defendant had made; and the answer, "What is that to us?" when it was suggested that the plaintiff might have gone upon the town. I think, therefore, we ought not to grant a rule.

LITTLEDALE J. concurred.

PARKE J. There was a slight case to go to the jury, and no more.

Rule refused.

(a) 9 B. & C. 403.

1833.

The KING *against* The Inhabitants of
TADCASTER.

Saturday,
April 27th.

ON appeal against an order of two justices, whereby *Jane Silversides*, and her five children, were removed from the township of *Leeds* in the county of *York*, to the parish, township, or place of *Tadcaster*, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The appellants admitted that *William Silversides*, the late husband of the pauper *Jane Silversides*, gained a settlement by apprenticeship in the township of *Tadcaster*, and the respondents admitted that he afterwards went to reside in the township of *Leeds*, and in *November* 1827 took a dwelling-house, there situate, as tenant to one *W. Wheelwright*, and occupied the same until *September* 1830, at the yearly rent of 6*l.* 10*s.*, which rent was duly paid for all that period; that in *May* 1828, *William Silversides* also took a building used as a shed, where he carried on his business of a bricklayer and mason, situate in the said township of *Leeds*, as tenant to one *Robert Myres*, and occupied the same until *September* 1830, at the yearly rent of 5*l.*, which rent was also duly paid for all that period. The dwelling-house was wholly separated and distinct from, and unconnected with, the other building, there being a separate and distinct tenement between them, belonging to and occupied by another person. The question for the opinion of the Court was, whether the pauper gained a settlement in *Leeds* by renting a tenement under 6 G. 4. c. 57.

A pauper in *Leeds* — 12^d
Nov. 1827 took
a dwelling
house of *A.*,
at an annual
rent of 6*l.* 10*s.*
In *May* 1828
he took of
B. a building
used as a shed,
situate in the
same parish,
but entirely
separated and
distinct from
the dwelling-
house, at an
annual rent of
5*l.* He occu-
pied both, and
duly paid the
rents, until
September
1830: Held,
that he thereby
gained a settle-
ment by rent-
ing a tenement
under the stat.
6 G. 4. c. 57.

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The KING
against
The Inhabit-
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Milner and *Baines* in support of the order of sessions. The pauper gained no settlement in *Leeds*. The settlement by renting a tenement arises by implication from the statute 13 & 14 *Car. 2. c. 12.*, which authorizes two justices of peace to remove any poor person “coming so to settle, as aforesaid, in any tenement under the yearly value of 10*l.*,” within forty days after he shall so come to settle; and in the reign of *George* the first it was held in *South Sydenham v. Lamerton* (a), that the taking of an entire tenement of 10*l.* per annum conferred a settlement though it lay in two parishes, but that two distinct tenements making together 10*l.* per annum in different parishes would not. That decision was virtually overruled in *Rex v. Newnham* (b), where it was decided that a settlement was gained by renting a house at a rent of 3*l.* per annum of one landlord, and land at the rent of 8*l.* of another landlord. Such was the state of the law before the passing of 59 *G. 3. c. 50.*, which enacts “that no person shall acquire a settlement in any parish by reason of his dwelling for forty days in any tenement rented by him, unless such tenement shall consist of a house or building being a separate and distinct dwelling-house or building, or of land within such parish, or of both, bonâ fide hired by him, at and for the sum of 10*l.* a year at the least, for the term of one whole year; nor unless such house or building shall be held and such land occupied, and the rent for the same actually paid for the term of one whole year at the least, by the person hiring the same.” Now these words seem to import, that there should be one tenement, taken at one time. It was de-

(a) *Str.* 57.(b) *Burr. S. C.* 756.

cided,

cided, however, in *Rex v. North Collingham* (a), and *Rex v. Stow* (b), that the tenement required by this statute might consist of different parcels hired at different times. The act 59 G. 3. c. 50. was repealed by 6 G. 4. c. 57., which enacts, that "no person shall acquire a settlement by reason of settling upon, renting, or paying parochial rates for any tenement not being his or her own property, unless such tenement shall consist of a separate and distinct dwelling-house or building, or of land, or of both, bonâ fide rented by such person in such parish &c., at and for the sum of 10*l.* a year at the least, for the term of one whole year; nor unless such house or building, or land, shall be occupied *under such yearly hiring*, and the rent for the same to the amount of 10*l.* actually paid, for the term of one whole year at the least; provided always that it shall not be necessary to prove the actual value of such tenement."

This latter statute differs from the former, inasmuch as it requires the house, or building, or land to be occupied, not by *the party hiring the same*, but *under such yearly hiring*. That expression imports, that the occupation should be under *one*, not several contracts of hiring. This case is not within the act, because the two buildings were not hired at the same time; and the words of an act of parliament are to be construed in their grammatical and natural sense, unless it appears clearly from the context that they were intended to be used in some other sense: per *Parke J.*, in *Rex v. Ditchet* (c).

But, secondly, in order to satisfy this statute, the tenement must consist of a dwelling-house, or building, or of land, or of both. It will be said, that the

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(a) 1 B. & C. 578.

(b) 4 B. & C. 87.

(c) 9 B. & C. 186.

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word *both* applies to any two of the three things previously mentioned, and consequently that the tenement may consist of a dwelling-house and building; but as the word *building* necessarily includes in it a dwelling-house, the statute may, therefore, be read as if it had said “a separate and distinct building, or land, or both;” and, if so, then two separate and distinct buildings would not satisfy the meaning of the statute.

Cresswell contra. The dwelling-house and shed constituted a tenement within the meaning of 6 G. 4. c. 57., which, in terms, requires that it should consist of a dwelling-house, or building, or land, or both. No sufficient reason can be assigned why it should not consist of a dwelling-house and building as well as of a dwelling-house and land, or of a building and land. The argument on the other side assumes that only two things are specifically mentioned, to which the word *both* can refer; a dwelling-house and building being one, and land the other; but three things are, in fact, mentioned; and the word *both*, which, in strictness, can apply to two only, is perhaps improperly used in the place where it occurs in this sentence. But why may it not be considered as repeated three times, and the clause read thus: “unless the tenement shall consist of a dwelling-house or building, or both; or of a dwelling-house, or land, or both; or of a building, or land, or both.” By so reading it, effect will be given to the word *both* in its natural sense; and the intention of the legislature will be effectuated. Besides, building and land, for this purpose, are synonymous. Lord *Coke* says, “that land legally includeth all castles, houses, and other buildings; for castles, houses, &c. consist upon two things, viz. land or ground, as the foundation

or

or structure thereupon ; so as passing the land or ground, the structure or building thereupon passed therewith (a).” In *Rex v. Macclesfield* (b), *Parke J.* expressed an opinion, that the occupation of a dwelling-house and another distinct building in the same parish, would confer a settlement ; and there can be no reason why it should not, as well as the occupation of a dwelling-house and land. Then, as to the different parcels of the tenement being taken at different times, there is no difference between the statutes 6 G. 4. c. 57. and 59 G. 3. c. 50., as far as respects the present case. Before the 59 G. 3. c. 50., a settlement might be gained by the occupation of a tenement under different hirings ; and in *Rex v. North Collingham* (c), and *Rex v. Tonbridge* (d), it was held, under that statute, that a tenement consisting of two parts, hired by the year, at different times, provided it was hired at the aggregate rent of 10*l.* per annum, and the whole was occupied for one whole year, would confer a settlement. The only difference (as to the present question) between that statute and the 6 G. 4. c. 57. is, that the first required the holding and occupation for a year, to be by *the party hiring* ; but the second only requires the occupation to be *under the yearly hiring* ; and in *Rex v. Ditchet* (e), and *Rex v. Great Bentley* (g), it was held, that a pauper who rented a tenement for a year at a rent exceeding 10*l.* per annum, but who underlet part, gained a settlement under the latter statute, the whole being occupied under the yearly hiring. To remedy the inconvenience resulting from those decisions, the 1 W. 4. c. 18. requires that the house, or building, or land, shall be occupied under the

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(a) *Co. Litt.* 4 a.(c) 1 *B. & C.* 578.(e) 9 *B. & C.* 176.(b) 2 *B. & Ad.* 870.(d) 6 *B. & C.* 88.(g) 10 *B. & C.* 520.

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yearly hiring by the person hiring the same. It is immaterial whether the rent be payable to one or several, and there need not be a concurrent occupation of the several tenements for the space of one whole year, *Rex v. Ormesby (a)*, though in the present case there was.

DENMAN C. J. It has been often observed, that the word *tenement* in the decisions upon the statute 13 & 14 Car. 2. c. 12. has received a much larger construction than the legislature intended; but those decisions are so numerous, and have been acquiesced in so long, that we must abide by them, unless the legislature has in clear terms altered the law which they established. Now, if the statute 59 G. 3. c. 50. or 6 G. 4. c. 57. was intended to alter the law in this respect, it seems to me that the enactments have not hit this precise case. Under the first of those statutes it was held, that a settlement might be gained by the occupation of a tenement on different hirings. In *Rex v. Stow (b)*, a pauper, three weeks after *May-day* 1820, hired a house and land in the parish of *Stourton by Stow* for a year from the preceding *May-day*, at a rent of 15*l.* and at the expiration of that time hired it again for another year at the same rent. He occupied the premises from the time of the first hiring until six months after the second hiring, and paid the rent during the whole period; and it was argued that the house and land were not occupied as the statute required, for the term of one whole year. Abbott C. J. there says, "It has been contended, the legislature must have meant the hiring, occupation, and payment to be for the same year; if that had been their intention, it would have been easy to say that the occupation and

(a) 4 B. & Ad. 214.

(b) 4 B. & C. 87.

payment should be for *such* term;" and *Holroyd C. J.* says, "If it had been intended that the occupation should be for the same term as the hiring, the legislature would probably have introduced the words *for the said term*. It seems to me, that the words 'nor unless,' have been used in order to divide the sentence, and to exclude the construction now contended for on behalf of the appellants." Now those observations apply to the present case; for the words of 6 G. 4. c. 57., "unless such house or building, or land, shall be occupied under such yearly hiring," do not make any difference in this respect. I am of opinion, that the fact of the house and shed having been hired at different times will not prevent the gaining of a settlement. But it is said, that, as the statute requires that the tenement shall consist of a dwelling-house or building, or land, or both, it is not satisfied by a tenement consisting of a dwelling-house *and* building; but I think the mere collocation of the words "or both" in that sentence ought not to prevent the acquisition of a settlement by the occupation of any two of the three things there mentioned, and consequently that a settlement was gained in this case by the occupation of the dwelling-house and shed.

LITTLEDALE J. The word *tenement* means any thing which one man holds of another; and it may consist of several parts not contiguous to one another, and hired at different times. According to the argument, if a man were to hire three fields at three different times, at an entire annual rent of 10*l.*, or one half of a field at one time and the other half in six months afterwards, that would not constitute a tenement within the meaning of the statute; but I think it wholly immaterial whether the different parcels of the tenement be

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be hired at the same time or not. That being so, I am of opinion that the pauper was not prevented from gaining a settlement by reason of the house and shed having been hired at different times. But then it is said the statute requires that the tenement shall consist of a dwelling-house, *or* building, or of land, or of *both*, and that the word *both* can apply only to two of the things previously mentioned, and that it must be referred to a dwelling-house and land, or a building and land, but not to a dwelling-house *and* building. The word *both* is improperly used in this sentence. But as no good reason can be assigned why a tenement (in order to confer a settlement) should not consist of a dwelling-house and building, as well as a dwelling-house and land, I think we are not bound by the inaccurate use of the word *both*, to hold, in this case, that the legislature meant to confine the meaning of the word *tenement* to a dwelling-house and land, or to a building and land. I think it includes a dwelling-house *and* building, as well as a building and land, and that it may even apply to all three.

PARKE J. I am of the same opinion. I am not sure that we shall, by our decision in this case, give effect to the intention of the legislature; but that is so obscure, that we cannot say with precision what it is. It struck me, in *Rex v. Macclesfield (a)*, that the occupation of a dwelling-house and another distinct building in the same parish would confer a settlement. If that were not so, a distinct dwelling-house and a pig-sty taken at an entire rent of 100*l.* would not be sufficient for the purpose. I think the hiring of a distinct dwelling-house and of a distinct building, of the required annual value,

(a) 2 B. & Ad. 870.

is sufficient to confer a settlement. Then, as to the house and shed having been held under different hirings, *Rex v. North Collingham* (a) has decided that a tenement held under two distinct hirings was sufficient to confer a settlement under 50 G. 3. c. 50., and the statute 6 G. 4. c. 57. has made no alteration in that respect. The pauper, therefore, gained a settlement in *Leeds*.

Order of sessions quashed.

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The KING *against* The Inhabitants of
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April 27th.

ON appeal against an order of two justices, dated the 8th of *February* 1832, whereby *Joseph Bird* was removed from the parish of *St. Matthew* in the borough of *Ipswich* in *Suffolk*, to the parish of *Woodbridge* in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case: —

To gain a settlement by serving an office, the party must reside in the parish where it is executed.

The pauper was, on the 29th of *September* 1820, appointed by the bailiffs of *Ipswich* a crane porter at the common quay in that town. The business of the crane porters is to unload vessels arriving at the common quay; it is a public annual office, and the pauper served it for a year. The quay where the vessels are unloaded is situated in the parish of *St. Mary at the quay*, at *Ipswich*, but during the whole of the year the pauper resided in the parish of *St. Matthew* in the same town; and the sessions, thinking the office was executed in the parish of *St. Mary at the quay*, were of opinion that no settlement was gained in *St. Matthew's*. If the Court should

(a) 1 B. & C. 578.

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be of the same opinion, the order of sessions was to be confirmed; if of the contrary opinion, the order to be quashed.

Austin, in support of the order of sessions, was stopped by the Court.

Biggs Andrews contra. It is not necessary that a party should reside in the parish where he executes his office. In *Rex v. Liverpool (a)*, the pauper resided in the parish of *Liverpool*, but served the office of sexton in the chapel of *St. James*. The churchyard was partly in the parish of *Walton* and partly in the parish of *Liverpool*, but no corpse was ever buried in that part of the churchyard which lay in the parish of *Liverpool*; and it was held, that the pauper gained a settlement in *Liverpool*; yet he did not exercise his office therein. [*Parke J.* There the churchyard was in two parishes; and the Court held, that he gained a settlement in that in which he resided. The statute 3 *W. & M. c. 11. s. 6.*, which gives the settlement, enacts, that if any person who shall *come to inhabit in any parish* shall execute any public annual office in the said parish during one whole year, he shall be adjudged to have a legal settlement in the same. It contemplates, therefore, that the party shall reside in the parish.]

DENMAN C. J. The words of the statute are sufficiently explicit to shew that a settlement can be gained only by serving an office in the parish where the party resides. The order of sessions must be confirmed.

Order of sessions confirmed.

(a) 3 *T. R.* 118.

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The KING *against* MATTHEW SNOWDON.*Saturday,*
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ON appeal by the defendant against four several rates or assessments, made for the relief of the poor of the parish of *St. Nicholas* in the town and county of *Newcastle-upon-Tyne*, for the months of *July, August, September, and October, 1831*, the sessions confirmed the rates, subject to the opinion of this Court on the following case:—

The lessee of toll traverse, and of a toll-house, (which he occupies), is not rateable to the poor for the tolls, but for the toll-house only.

The mayor and burgesses of *Newcastle-upon-Tyne* are, as well by prescription as by virtue of divers charters, and particularly a charter of the 31 *Eliz.*, constituted a corporation by the name or style of “The mayor and burgesses of the town of *Newcastle-upon-Tyne*,” and have been seised from time immemorial of the town and borough of *Newcastle-upon-Tyne* in their demesne as of fee, and hold the same in fee farm under the crown, at the yearly rent of 100*l.* The mayor and burgesses claim, as of right by prescription, to demand and receive as a toll thorough, divers tolls, dues, and duties, called the thorough toll or great toll, in respect of goods, wares, and merchandizes, not the property of a burgess of the town, brought into and carried out of the town, in consideration of their keeping in repair all the public streets of the town of *Newcastle-upon-Tyne*, and also two third parts of the bridge over the river *Tyne*, called *Tyne Bridge*, which connects the town with the county of *Durham*.

The appellant, who is not an inhabitant of the parish of *St. Nicholas*, is lessee under the mayor and burgesses of

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their toll-house, situate in the parish of *St. Nicholas*, at the north end of *Tyne Bridge* (one of the ancient avenues leading into and out of the town), and of such of the above-mentioned tolls as are collected at that avenue. The joint annual value of both tolls and toll-house is 500*l.*, but the annual value of the toll-house, when separated from the tolls, is only 10*l.*

By an act passed in 1822, the mayor, burgesses, and their lessee of the said tolls were authorized to take from all persons who should bring or convey into or out of the town, by any of the avenues or passages leading into or out of it, any goods, &c., liable to the said tolls, such tolls as the said mayor and burgesses were then, by law, entitled to receive in respect of the said thorough toll or great toll; and the act also authorized “the mayor and burgesses, and their lessee of the said tolls, to erect, set up, and maintain at all and every or any of the avenues or entrances leading into or out of the town, at which the said tolls should be demandable, any convenient or proper toll-house or building, with suitable conveniences for the accommodation of any person or persons to be employed in the collection of the said tolls, dues, and duties;” and it enacted “that every collector appointed to receive the tolls, should place his Christian name and surname, painted on a board in legible characters, in some conspicuous part of each toll-house immediately on his coming on duty, and continue the same so placed during the whole time he should be upon such duty.”

The toll-house in question is occupied by the servant or collector of the appellant, and the appellant's name is put up in front of the toll-house. The tolls are not actually paid to and received by the collector in the toll-

toll-house, but are collected from the parties liable to pay the same upon the street in front of, and as they pass, the toll-house. The total annual produce of the tolls received at all the avenues or entrances into the town, the title to which is founded on the consideration of repairing the streets, amounts to 4000*l.*, and it does not appear whether or not the appellant makes any profit. The rent under which the appellant holds these and other tolls is paid half yearly into the *Town Chamber*, the legal place of receipt of the corporation revenue. A separate account is kept of the sums received in respect of the whole of the tolls called the thorough toll, and likewise a separate account of the sums expended in repairing the streets, the consideration on which the title to those tolls is founded; but in no one year has the aggregate amount of the sums received for these tolls been sufficient to defray the expence of keeping the streets in repair; and no regard is paid to the sum received in regulating the amount expended on the streets, the deficiency being supplied, as a matter of course, out of the general fund of the corporation. The appellant is rated in all the four rates or assessments as follows; viz. "*Snowdon, Matthew*. Toll-house situated at the north end of *Tyne Bridge*, and the tolls payable there, 500*l.*"

The question for the opinion of this Court was, whether the appellant were rateable for the toll-house and tolls, or either of them. If for the toll-house alone, then the four rates or assessments appealed against were to be amended, by striking out in each "*and the tolls payable there,*" and substituting the figures 10*l.* for the figures 500*l.* If he were rateable for neither the tolls

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nor the toll-house, then the order of sessions was to be quashed. If he were rateable for the tolls either alone, or together with the toll-house, the order of sessions was to be confirmed, with such amendment, if any, with respect to the amount on which the rate was made, as the Court should see fit.

Aglionby and *T. Greenwood* in support of the order of sessions. The mayor and burgesses of *Newcastle* being seised in fee of the town, the soil of the streets is in them. The toll, therefore, paid to them for passing over their soil is a toll traverse, and their lessee is rateable in respect of such tolls constituting the profits of the land. This is something like *Rickards v. Bennett* (a), where in trespass against a lord of a manor, he, in his plea, set out various burdens borne by him; and then prescribed, not by reason of those burthens, but generally as lord of the manor, for a toll upon all goods bought and delivered, or bought elsewhere and brought into and delivered in a town within the manor, which from time immemorial had been parcel of the manor; and it was held, after verdict, that this was good as a claim of toll traverse, although the burthens set out did not constitute a sufficient consideration for a toll thorough. It is true the sessions have found that it is called and that the corporation claim it as a *toll thorough*; but it is manifestly a toll traverse, being taken for passage over the soil which is in the corporation. [*Parke J.* Assuming it to be a toll traverse, the lessee is not an occupier of

(a) 1 B. & C. 223.

any part of the soil, in respect of which the tolls arise.] The act of parliament authorizes the corporation or their lessees to take from all persons, who shall bring or convey into or out of the town, by any of the avenues or passages leading into or out of it, any goods, &c., such tolls as the corporation are by law entitled to receive in respect of the toll called thorough toll or great toll, in consideration of their keeping in repair the public streets. It also authorizes the corporation to erect and maintain toll-houses, and requires every collector of the said toll dues and duties, to place his Christian and surname, painted on a board, in legible characters on the said toll-house. Here the appellant's name was affixed to the toll-house, and he, by his servant, occupied the toll-house, and received the tolls; and he is rateable for both. If this were a toll thorough, the question might be different; but in *Rex v. Eyre (a)*, where it was held that the lessee of the tolls of a public bridge was not rateable to the poor in respect of them, it was not stated that he was the occupier of a toll-house. Here the lessee, by his servant, was the occupier of a toll-house erected at one of the avenues where toll was demandable. [*Parke J.* That occupation makes him liable to be rated in respect of the profits of the toll-house; but if that were pulled down, or he did not occupy it, he would be entitled to receive the tolls. Assuming the toll to be a toll traverse, it would be paid for passing over the soil of another. The lessee of the tolls here does not occupy any portion of the soil in respect of which the toll is payable; he is rateable, therefore, for his house, but not for the tolls.]

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(a) 12 East, 416.

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a period of nearly two years, he slept in the appellant parish. The question for the opinion of this Court was, whether this was a service under such a yearly hiring as would confer a settlement?

Ingham in support of the order of sessions. This was clearly a hiring for a year, and not exceptive. The case falls within *Rex v. Byker* (a). There the pauper was hired by indenture, for a year, as a driver in a colliery at the wages of 1s. 10d. for a good day's work not exceeding fourteen hours, and 2d. a day more when that time was exceeded; and he was to forfeit 10s. 6d. for every act of disobedience, and 2s. 6d. a day for lying idle, or for absence on working days, to be deducted out of his wages; and there was a covenant, that in case the master, about *Christmas*, should wish to repair any engine belonging to the colliery, he might stop the workings for any period not exceeding seven days, without paying any wages; and it was held that this was a conditional and not an exceptive hiring. Here, if the agreement was conditional, the condition has not been acted upon: but it appears clearly to have been absolute. The case is even stronger than *Rex v. Byker*, for the pitmen agree to work *constantly* during the whole year, which gives the masters a right to their service at all times, subject only to the implied exception of hours for food and rest, *Rex v. All Saints Worcester* (b). And the daily work is to be "a reasonable day's work, to the satisfaction of the masters." In *Rex v. Gateshead* (c), which will be relied on by the other side, it was

(a) 2 B. & C. 114.

(b) 1 B. & A. 322.

(c) 2 B. & C. 117, note.

stipulated

stipulated that each man should, *on each working day, do such a quantity of work as should be deemed equal to a full day's work*; and not leave the pit until that quantity was completed, or in default thereof, he should forfeit 2s. 6d.; and the Court held it to be an exceptive contract, because the pauper was not to be under the controul of the master for the whole of every day. In that case, as reported in 3 *Dowling and Ryland*, 333. note *b*, there was an express exception in the contract, for the labourers were to work for the whole year except ten days during the *Christmas* holidays. If that be correct, the case differs essentially from this. The proviso there (which appears also in *Rex v. Byker*, but not in the present case,) that the jurisdiction of the justices should not be ousted, was held to be immaterial.

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Stephen Temple contra. This was an exceptive hiring, for the agreement did not give the master a controul over the servant during the whole year. If it was not an exceptive, it was a conditional hiring. But in *Rex v. Byker* (a), *Bayley J.* says, "If the bargain be originally made for an entire year, and terms are introduced applicable to a continuance of the relation of master and servant during the whole year, but there is also a provision, that in a given event it shall be competent to the parties to put an end to or suspend the service for a part of the year; still a settlement is gained if the service is actually performed for a whole year, and neither party avails himself of the condition. A conditional hiring is, for this purpose, the same as an absolute hiring, unless the condition is acted upon."

(a) 2 B. & C. 120.

Here

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ceeded, and the pauper was to forfeit 2s. 6d. per day for lying idle, to be deducted out of his wages. It was contended, that that was an exceptive contract, because the master could not compel the pauper to work more than fourteen hours a day, and also because the pauper, on the payment of 2s. 6d. per day, was at liberty to absent himself. But the Court held, that the fourteen hours was only mentioned in the master's covenant to regulate the amount of the wages, and that the relation of master and servant continued during the whole twenty-four hours of every day, and consequently during the whole year; and that the clause as to forfeitures was intended not to give the servants a liberty to absent themselves, but merely to enforce regular attendance. The same observation applies to the clause of forfeiture in this case. In *Rex v. Gateshead* it was stipulated, that each man should, on each working day, do such a quantity of work as should be equal to a full day's work, and should not leave the pit until that quantity was completed, or, in default thereof, should forfeit 2s. 6d. There, as soon as each man completed his full day's work, he was at liberty to quit, and was no longer under the controul of his master. According to the report of that case in 3 *Dowling & Ryland*, it was part of the contract of hiring, that the labourers were to work for the whole year, except ten days during the *Christmas* holidays, when they were not to work, nor to be liable to any penalties for not working. If that were a correct statement of the contract, there would be a clear exception of ten days. It appears, however, from the reasoning of the Judges there given, that the hiring was held to be exceptive, not because the pauper was not bound to work for his master during the ten days, but because he was
not

not bound to work during the whole of every day, but during such part of the day only as might be required to complete a full day's work. The contract, as stated in 2 *Barnewall & Cresswell*, 117., was, that the master should find work for the men during the whole year, and forfeit 2s. 6d. for every day that he should oblige them to be idle, except at the *Christmas* holidays, which were not to exceed ten days. According to that statement, the stipulation, as to the ten days, would appear not to be an exception in the contract of hiring, intended to give a privilege to the servant, but to be a provision introduced for the benefit of the master; and, considering the reasons on which the judgment of the Court was founded, that must be taken as the correct report of the case. I think, therefore, this case falls within *Rex v. Byker*, and that a settlement was gained in the parish of *St. Helens Auckland*. The order of sessions must be confirmed.

LITTLEDALE J. If the cases referred to had never been decided, I should not have had the slightest doubt on this case. By the agreement of the 4th of *February* 1815, the pauper agreed to hew, pit, and work coal till the 4th of *February* 1816, and to work constantly at the colliery or to forfeit 1s. for each and every day he should absent himself or not work a reasonable day's work. Now, the latter stipulation bound the pauper to pay 1s. per day, if he did not perform his part of the contract. There was a contract to work for a whole year and every day in the year, and the master had a right to call on the pitmen so to work. The mere agreement to pay 1s. per day as a forfeiture does not make the contract exceptive, because neither party can be supposed to have contemplated,
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at the time when the contract was entered into, that there should be an absence or neglect to work.

PARKE J. I felt some little difficulty, at first, in distinguishing this case from *Rex v. Gateshead (a)*, but I think it falls within *Rex v. Byker (b)*. In the first of those cases there was a stipulation that each man should, on each working day, do a full day's work, and that he should not leave the pit until that quantity of work was completed, and that, on default thereof, he should forfeit 2s. 6d. It was therefore stipulated by implication, that the men were not to be under the controul of the master on days which were not working days, nor on any day as soon as a full day's work was completed.

Order of sessions confirmed (c).

(a) 2 B. & C. 117. note.

(b) Ibid. 114.

(c) See *R. v. Oselt cum Gawthorpe*, ante, 216.

ROWE *against* SHILSON and Another.

An embankment company was by an act of parliament (not limited in duration) empowered to make a road,

and to erect turnpikes upon or across "any lanes or ways leading or that might thereafter lead out of the same;" and to take tolls at such turnpikes. By subsequent acts, another company was empowered to make a railway, and it was enacted, that all persons should have free liberty to use the same, with carriages properly constructed, upon payment only of such rates and tolls as should be demanded by the railway company, not exceeding the sums mentioned in that act. The railway was afterwards made, and it crossed the embankment company's road:

Held, first, that the railway, though made and opened to the public by act of parliament, was a "way" within the meaning of the first-mentioned act. Secondly, that the clause in favour of the public in the railway act, did not take away the vested right of the embankment company to their tolls; and, consequently, that they might take toll of persons crossing their road upon the railway.

By

By act of parliament 42 G. 3. c. 32. certain persons were incorporated by the name and style of “The Company of Proprietors for embanking Part of the *Lairy* near *Plymouth*” (a); and the embankment was accordingly made by the company. By an act 43 G. 3. c. xv. the company were empowered to make and maintain a road from *Efford Quay* in the said county to the borough of *Plymouth*; and it was also enacted as follows:—“That it shall and may be lawful to and for the said company to erect or cause to be erected such and so many turnpikes to receive the tolls hereby granted upon or across the said road, and on or near the sides thereof, or in, near, upon, or across any lanes or ways leading or that may hereafter lead out of the same, as they shall think proper.” And that in consideration of the great expences the said company must incur by making, maintaining, and supporting the said road, it was enacted “that it should be lawful for the said company to demand and take or cause to be demanded and taken at the said turnpikes, amongst other tolls therein mentioned, for every waggon,” &c. And that the company might let the tolls to farm. The road was soon after made pursuant to the act.

By an act, 59 G. 3. c. cxv., for making and maintaining a railway or tram-road from *Crabtree*, in the parish of *Egg Buckland*, in the said county, to communicate with the prison of war on the forest of *Dartmoor*, in the said county, reciting that such railway would be of material benefit and convenience to the neighbourhood and the country at large, a company was incorporated for making, completing, and maintaining the same,

(a) See *Lowe v. Govett*, 3 B. & Ad. 863.

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under the name of “ The *Plymouth and Dartmoor* Railway Company,” and was invested with certain powers for that purpose. The act provided, among other things, that when the said railway should cross any turnpike-road or public highway, the ledge or flank of such railway, for the purpose of guiding the wheels of the carriages, should not exceed one inch in height above the level of such road : and it is thereby further enacted, in consideration of the great charge and expence which the said company must incur and sustain in making and maintaining the said railway and other the works thereby authorised to be made and maintained ; that it shall and may be lawful for the same company, from time to time, and at all times thereafter, to ask, demand, take, recover, and receive, for the use of the same company, for the tonnage of all goods, wares, merchandizes, and other things which shall be carried or conveyed upon the said railway, or upon any part thereof, certain rates and duties therein mentioned : And it is thereby further enacted that all persons shall have free liberty to pass upon and use the said railway, with carts, waggons, or other carriages, properly constructed, as hereinafter mentioned, and to employ the said company’s wharfs and quays for loading and unloading such goods and other things, upon payment only of such rates and tolls as shall be demanded by the same company, not exceeding the respective sums therein mentioned, subject to the rules and regulations which shall, from time to time, be made by the said company, by virtue of the powers therein granted. The railway was completed by the company at a great expence, the time being somewhat varied afterwards by an act of 2 G. 4., which it is unnecessary to notice further.

By

By an act, 1 G. 4. c. liv., reciting that a branch railway, to join the *Plymouth* and *Dartmoor* railway, and to communicate with certain places there mentioned, would be of public utility, the Railway Company were empowered to make, complete, and maintain such branch railway, and to execute and perform all such works, matters, and things as should be requisite and convenient for that purpose. And it was enacted, that the said statute of 59 G. 3., and the several powers, authorities, directions, restrictions, provisions, rates, duties, and other matters and things therein contained, should be used and exercised by the said Railway Company, and be applied, enforced, and put in execution for making, completing, preserving, and maintaining the said branch railway, and also for making, erecting, doing, and performing all such other works, matters, and things as they should think necessary or expedient for the benefit of such railway, and for defraying the expenses thereof; and should and might also be used and exercised by the owners and proprietors of lands lying near or adjoining to the said branch railway, in such and the like manner, and as fully and effectually, as if the several powers, authorities, restrictions, provisions, rates of tonnage, and other matters and things contained in the same act, had been repeated and re-enacted in the body of that present act, and as if the branch railway and other works, by the same act authorized to be made, completed, and maintained, had been described in the said act passed in the fifty-ninth year aforesaid, as part of the works to be made and done by virtue of that act.

The branch railway was made accordingly, and it crossed the Embankment Company's road in two places; at one of which, on the side of their turnpike-road, the

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company erected a toll-bar. The toll, fixed by the act 43 G. 3. c. xv., was demanded on behalf of the company's lessee (the plaintiff in this cause), from a servant of the defendant, who passed with a waggon on the railway across the Embankment Company's road, and through the turnpike-gate. He had paid the regular tolls for passing along the railway. If the Court were of opinion that the plaintiff was entitled to recover, a verdict was to be entered for him for such sum as they should think proper; otherwise a nonsuit. This case was now argued by

R. Bayly for the plaintiff; who relied upon the words of the act 43 G. 3. c. xv. (empowering the Embankment Company to make the road and receive tolls), and contended that the branch railway in question was a way leading into and out of the Embankment Company's road, within the meaning of that act, and across which they were authorized to place bars for the receipt of toll; that there was nothing in the acts for making the principal and the branch railway to supersede this right of the company; and that there could be no argument, on the ground of hardship, against the right of taking toll for merely crossing a road, since the general exemption in this case only existed by an express provision in the Turnpike Act, 3 G. 4. c. 126. s. 32., and that, by 4 G. 4. c. 95. s. 90., did not extend to roads maintained under acts of parliament passed for an unlimited period, which was the case with the Embankment road.

Butt contra. A railway like this is a public highway. *Rex v. The Severn and Wye Railway Company* (a); and

(a) 2 B. & A. 646.

the

the acts establishing it have given the public a right to pass along it, “ upon payment only of such rates and tolls as shall be demanded by the Railway Company, not exceeding the sums mentioned ” in the act 59 G. 3. c. cxv. That right, according to the settled rule on such subjects, cannot be fettered with a new pecuniary imposition, unless by clear and unequivocal words of an act of parliament. Now, by the act just referred to, the only tolls to be paid on the railway are those demandable by the Railway Company. It is true, that at that time the branch was not formed; but, by 1 G. 4. c. liv., all the provisions of the former act are made applicable to the branch road, as if that road had been therein described; and beyond this there is nothing in the act of 1 G. 4. to impose any charge on the public in respect of the branch road. Besides, the words (43 G. 3. c. xv.) enacting that the Embankment Company may erect turnpikes on their road “ in, near, upon, or across any lanes or ways leading, or that may hereafter lead, out of the same, as they shall think proper,” does not, by the terms used, apply to public highways, established by act of parliament.

DENMAN C. J. There is no doubt that parties who seek to burden the public with an imposition of this kind must establish a clear title to do so. The authority here relied upon is in the words of 43 G. 3. c. xv., enacting, that it shall be lawful for the Embankment Company to erect turnpikes for receipt of tolls, upon or across the road to be made by them, and on or near the sides thereof, or in, near, upon, or across any lanes or ways leading, or that may thereafter lead, out of the same, as they shall think proper; and to demand and take at such turnpikes the tolls mentioned in the act. I think

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this, if nothing followed, would give a clear right of taking toll for passage upon roads crossing the Embankment Company's road. It is said, indeed, that the clause does not apply to roads made by public authority; but there is nothing in the words themselves to support such a distinction; and although the road in question is made by public authority, it is for the advantage of the company who obtain the act. Then, does the statute 59 G. 3. c. cxv. make any alteration in the case? That only enacts, that all persons shall have liberty to use the railway with carriages properly constructed, upon payment only of such rates and tolls as shall be demanded by the Railway Company, not exceeding the sums mentioned in the act. That appears to me not to take away the former right of the embankment company, but only to prescribe what amount of toll shall be taken by the proprietors of the railway. If it had been intended by the statute to do what would certainly be a violent act, namely, to deprive the Embankment Company of tolls which they before enjoyed in the manner here suggested, that purpose would, I think, have been more clearly expressed.

LITTLEDALE J. I think the clause imposing the tolls in 43 G. 3. c. xv., extends to all roads, whether made by private individuals or by authority of parliament. If it was meant that any kind of road to be thereafter made should be exempted from the tolls granted to the Embankment Company, that should have been done by express words. I am also of opinion, that those tolls are not taken away by the subsequent act, which gives liberty to all persons, with carriages of a certain description, to use the railway, on payment only of the
tolls

tolls there mentioned. The object of that enactment is only to point out what persons shall use the railway, and what they shall pay the Railway Company for so doing. It is true that, if plaintiff's claim is well founded, they cannot cross the Embankment Company's road without paying other tolls; but we cannot, on that account, say that the Railway Act takes away the tolls before granted to the Embankment Company.

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PARKE J. I am of the same opinion, though I have entertained some doubts. I agree in what has been urged, that the Embankment Company, as a private body, could not acquire the rights in question against the public unless the legislature expressly gave them. The clause which has been relied upon by the plaintiff in 43 G. 3. c. xv. does clearly give such rights; the only question is, how far they operate upon roads afterwards made. There is no doubt that if the Railway Company had by contract, without the intervention of parliament, acquired the power of making their road to lead into the embankment road, that would have been a way within the express meaning of the clause in question. But it is necessary to go a step further. A railway leading into that road is made by an act of parliament, which confers certain rights upon the public: and the question then is, as to the effect of the former act upon such new public way. Upon this point I had some doubt; but I am of opinion that unless the subsequent act expressly takes away the vested right which the Embankment Company had in the tolls before granted, the public are not entitled to cross their road without paying toll. Then, what is there to give the public that right? The liberties they are to enjoy in respect of the principal

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railway are stated in the act 59 G. 3. c. cxv.; and although that clause is not expressly re-enacted, as to the branch road, in 1 G. 4. c. liv., yet this latter statute provides that the several powers, authorities, directions, restrictions, provisions, rates, duties and other matters and things, contained in the first Railway Act shall be used and exercised by the Railway Company, and shall be applied, enforced, and put in execution, for making, completing, preserving and maintaining the branch railway, and for doing what shall be necessary for the benefit, and for defraying the expenses thereof, as if the several powers and authorities, rates and other matters, contained in the former act, had been re-enacted in this, or as if the branch railway had been described in that act. The latter act, therefore, incorporates and explains the clause in question in 59 G. 3. c. cxv. I think that clause was merely a bargain between the Railway Company and the public, that the public should use the railway upon certain terms, but not subject to any greater tolls than were stated in the act. The company were to be prevented from enhancing the duties above the original rate. But this does not enable persons to cross the road of another company without paying the rates before claimable by them; and unless the act did take away the vested right of that company, the public would not be entitled to resist the present demand. On the whole, therefore, I agree that the plaintiff ought to recover.

Postea to the plaintiff.

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OGLE *against* STORY, Gent., One, &c.Monday,
April 29th.

ASSUMPSIT for money had and received, &c. At the trial before Lord *Tenterden* C. J., at the sittings in *London* after *Trinity* term 1832, the facts of the case appeared to be as follows:—The plaintiff had purchased an estate upon which one *Fullwood* held a mortgage, with a proviso for re-conveyance to the mortgagor, his assigns, &c., at the costs and expenses of the mortgagor, on payment of principal and interest. The plaintiff afterwards contracted to sell the estate, clear of the mortgage, to a Mr. *Pemberton*, and a day was appointed for completing the purchase. The plaintiff sent a release of the mortgage to the defendant, who was the mortgagee's solicitor, for approval, and also requested several times to know what would be the amount of his bill of costs on the re-conveyance of the premises; but no bill was sent till the parties met for the completion of the purchase, as appointed. The defendant's clerk then attended, and brought with him the deeds which *Fullwood* held as mortgagee, and the defendant's bill of costs. The plaintiff's brother, who acted as his solicitor, observed that the bill was large, and that its correctness could not be ascertained then; and he asked if payment was required at that time. The clerk said his instructions were to receive the money. The plaintiff's solicitor than said that he would pay it if he was obliged to do so, but should reserve the right of taxing it on a future occasion. The bill

A. purchased premises which were mortgaged to *B.* with a proviso for re-conveyance, at the costs of the mortgagor, on payment of principal and interest. *A.* sold the premises, and was to pay off the mortgage on the completion of the purchase; but *B.*'s attorney, who held the title-deeds, would not deliver them to *A.* till his own bill was also paid. The bill contained some items fairly chargeable on the occasion as costs due from the mortgagor, and others which were properly payable by the mortgagee:

Held, that the attorney might enforce his lien on the deeds against *A.* to the whole extent of the bill; and that *A.*, having been obliged to pay it for the purpose of releasing the deeds, could not recover back from the attorney the amount unduly charged.

not recover back from the attorney the amount unduly charged.

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was then paid, the purchaser, with the assent of all parties, giving one check, in part of the purchase-money, for *Fullwood's* principal and interest, and the defendant's costs. The clerk gave the following receipt: — "Received of Mr. *Pemberton*, by the direction of *J. W. Ogle*, Esq. (the plaintiff), the sum of," &c. "for costs, as by bill annexed." The deeds were then handed over, and the purchase completed. The plaintiff having afterwards ascertained that the bill was not such as a mortgagor could fairly have been called upon to pay (which was admitted at the trial), brought this action to recover back the excess, which he had been compelled to pay in order to obtain possession of the deeds. For the defendant it was insisted, that, as an attorney holding deeds of his client, he had a lien upon them for the whole of his bill of costs, against all the world; that it was immaterial to him by whom the bill was paid, but without payment he was not bound to hand them over, or even bring them to the meeting; that the complaint was, not so much that the bill was exorbitant, as that a mortgagor ought not to pay it: if the bill was in itself excessive, that was a question between *Fullwood* (the mortgagee) and the defendant; and the present action if maintainable by the plaintiff, should have been brought against *Fullwood* himself. Lord *Tenterden*, however, was of opinion that the plaintiff was entitled to recover, and he directed a verdict accordingly, but gave leave to move to enter a nonsuit. A rule nisi having been obtained for that purpose,

Sir *James Scarlett* and *Platt* now shewed cause. The defendant could not enforce any lien for more than the amount he was entitled to receive from the plaintiff; and

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 against
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and that amount is measured by the terms of the mortgage deed. When the mortgage was redeemed, the deeds in question were no longer *Fullwood's*. As soon as his principal, interest, and reasonable costs were paid, he was bound to hand them over. The defendant then could not claim to retain one man's title-deeds for another's debt. His lien upon them was commensurate with *Fullwood's* right. Whether the defendant's charges were just or not, as between him and *Fullwood*, is nothing to the plaintiff. The defendant might have desired the plaintiff to settle the costs with *Fullwood*, who could not have claimed more of the plaintiff than the proper costs as between those parties; but, instead of that, he has chosen to stand in *Fullwood's* place, and receive the costs himself from the plaintiff. He was not, then, entitled to demand more than would have satisfied *Fullwood*. He made himself, in fact, his agent in that transaction. [*Parke J.* *Fullwood* had a legal interest in the deeds, and might pledge them. He did pledge them with his own attorney for the amount of his bill. Could not the attorney retain them till that was paid?] He knew, when he received them, what was the extent of the depositor's interest. If the defendant is not liable in the present action, there is no opportunity of taxing his bill; and that might be alleged by *Fullwood*, if the plaintiff sued him on account of these charges.

F. Pollock and *Kelly*, contra, were not heard.

DENMAN C. J. It is not contended that the mortgagee had not a right to pledge these deeds. Then a party who takes property subject to a mortgage, must
ask

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ask where the title-deeds are: he must take care to secure himself. It makes no difference that the person with whom they were pledged was the mortgagee's attorney. The rule must be absolute.

LITLEDALE J. I am of the same opinion. The plaintiff should have ascertained before in whose hands the deeds were.

PARKE J. The defendant had a lien for the amount to which he was entitled against *Fullwood*. He, as mortgagee of the property, was competent to pledge the deeds with the defendant for that sum. The fact is, that the plaintiff has overpaid *Fullwood*; and he should have taken his remedy against him.

Rule absolute.

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JOHN NURSE and MARY, his Wife, J. HARRIS,
and Two Others, *against* C. WILLS, Gent.
One, &c.

Monday,
April 29th.

THE declaration stated, that, by agreement between the plaintiffs and the defendant, — reciting that one *James Lang* had been arrested at the suit of the plaintiffs; that the defendant had become bail to the sheriff; that the bail bond had been forfeited; that *Lang* had confessed the action, and damage sustained by the plaintiffs to the amount of 200*l.*, and had consented that judgment should be entered up, and execution should issue for the debt and costs due to the plaintiffs from *Lang*, — it was agreed between the plaintiffs and the defendant, and the defendant undertook and promised, *in consideration that the plaintiffs should not nor would enter up judgment, or sue out execution, or proceed further in the suit, or take any further steps therein against Lang, the sheriff, or the bail, until a certain day, — that the defendant should render Lang on that day, so that the plaintiffs might have the full security of his body, or, in default, should pay to the plaintiffs 137*l.* 15*s.* 2*d.*,*

Declaration *Shew- 24*
by husband and wife, stated that
by agreement
between the
plaintiffs and the
defendant, —
reciting that
one *J. L.* had
been arrested
at the suit of
the plaintiffs;
that the de-
fendant had
become bail to
the sheriff; that
the bail had
been forfeited;
and that *J. L.*
had given a
cognovit for
the debt and
costs, — it
was understood
and agreed
between the
plaintiffs and
defendant, and
the defendant
undertook and
promised, in
consideration
that the plain-
tiffs would not

enter up judgment, or sue out execution against *J. L.* until a certain day, that he, the defendant, would render *J. L.* on that day, or, in default, pay the debt and costs. Averment, that the plaintiffs had not entered up judgment or sued out execution against *J. L.* before the day. Breach, that the defendant did not render *J. L.* on the day, or pay the debt and costs:

Held, on motion in arrest of judgment, after verdict for the plaintiffs,

First, that, as the agreement was stated to be *with* the plaintiffs, the promise must be taken, after verdict, to have been made *to* them.

Secondly, that it sufficiently appeared that the wife had a joint interest, because the recital in the agreement of a cognovit by *J. L.* to *all* the plaintiffs, was an admission by the defendant of such joint interest.

Thirdly, that, though the agreement by the wife was void, it might be rejected as surplusage, and that the count would then be good, as stating a promise to pay the debt and costs to the plaintiffs, in consideration that they would not enter up judgment, or sue out execution until a given day.

being

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being the debt and costs aforesaid. The declaration then proceeded to state a further agreement between the plaintiffs and the defendant, that the time for rendering *Lang* should be extended to the first day of *Easter* term, it being fully understood, and the defendant, in consideration of the premises and of such extension, promising and agreeing that he, the defendant, would render *Lang* on the last-mentioned day, or, in default thereof, would pay to the plaintiffs the above-mentioned sum, being the debt and costs aforesaid. The declaration then stated a further agreement between the said parties, in similar words, to extend the time until the first day of *Trinity* term. It then stated, that the plaintiffs had not entered up judgment, nor sued out execution, nor proceeded further in the said suit, until the first day of *Trinity* term, nor hitherto; and assigned for a breach, that the defendant had not rendered *Lang*, nor paid the plaintiffs the said sum of money.

In a second count, the two extensions of time were omitted; and it was stated that, in consideration that the plaintiffs should not nor would enter up judgment or sue out execution, or proceed further in the suit against *Lang*, the sheriff, or the bail, until the 20th of *February*, the defendant undertook, &c. that he would then duly render *Lang* into custody, or, in default, pay the said sum to the plaintiffs, being the debt and costs in the said action; and a similar breach was assigned.

Judgment having been signed after a verdict for the plaintiffs, with general damages, a rule nisi was obtained for arresting the judgment, on the ground that one or both of the counts were bad; first, because the promises upon the extensions of time mentioned in the first count were not averred to have been made to the plaintiffs:

plaintiffs: and secondly, because the consideration for the promises in each count, supposing them rightly stated, was an agreement by the wife, jointly with her husband and others, and, as she was not capable of making a contract in point of law, she ought not to have joined in the action.

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NURSE
against
WILLS.

Kelly and *Hayward* now shewed cause. It may be collected from the decisions that, wherever the action will survive to the wife, the husband and wife may join. Now, here, *Lang*, by his cognovit, admitted the joint interest of the husband and wife, and that would have survived to her. In debt on bond made to the wife during coverture, *Howell v. Maine* (a), or in assumpsit on a promissory note given to the wife during coverture, *Philliskirk v. Pluckwell* (b), husband and wife may join. So, where husband and wife have recovered judgment on a bond made to the wife *dum sola*, husband and wife may join in an action on such judgment, or husband may sue alone, for that which was before a chose in action transit in rem judicatam, and is of another nature from what it was before the coverture, *Woolverston v. Fynnimore* (c).

The Solicitor General and *White*, contra. The first count is bad; first, because no promise to the wife is alleged: there is nothing but a promise resulting in law, and that is to the husband. In *Buckley v. Collier* (d) it was held, that the husband must sue alone for work done by the wife during coverture, unless an express promise to the wife be alleged. [Parke J. That was

(a) 3 Lev. 403. See 1 Selw. N. P. 288. n. (12.) (b) 2 M. & S. 393.

(c) Trin. 18 & 19 G. 2. 1 Selwyn, N. P. 288. (d) 1 Salk. 114.

on

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 WILLS.

on demurrer : here, the agreement is stated to have been between the plaintiffs and defendant, and that being so, the promise, after verdict, must be taken to have been made to them.] It does not appear that the wife here had any joint interest which would have entitled her to maintain the original action. [*Parke J.* The cognovit is given to *all* the plaintiffs and that being recited in the agreement to which the defendant is a party, is a sufficient admission of the joint interest of the wife.] Assuming that to be so, this differs entirely from the case of a bond or promissory note given to the wife while sole, because she is then capable of contracting; the action here is brought on a contract which the wife, under coverture, was incapable of making, for a married woman cannot contract; a promise, express or implied, gives no interest to her; the whole results to the husband, and the action ought to be brought in his name. *Bidgood v. Way* (a). A feme covert cannot even have goods with her husband, *Abbot v. Blofield* (b). In this case it is necessary to state a consideration for the promise, and that distinguishes it from *Philliskirk v. Pluckwell* (c), where it was held, that husband and wife might sue on a promissory note made to the wife during coverture. Here, the forbearance to enter up judgment, or sue out execution, was the act of the husband, and not of the wife. In *Rumsey v. George* (d), Lord *Ellenborough* said, “A consideration of forbearance by the husband is a consideration arising during coverture, and expressly moving from the husband, who has the power of immediately enforcing the claim; and is, therefore, sufficient to support a promise made to

(a) 2 Bl. Rep. 1236.

(b) Cro. Jac. 644.

(c) 2 M. & S. 393.

(d) 1 M. & S. 176.

him

him alone, who is the instrument of forbearance.”
 [Parke J. May not what is alleged to be the contract of the wife be treated as wholly void? In *Brashford v. Buckingham* (a), assumpsit was held to lie by husband and wife, on a promise, in consideration that she would cure a wound, it being alleged that she had cured it.] There the cure was the act of the wife. Here, the forbearance is the act of the husband. If the agreement with the wife be rejected as surplusage, the right of the wife is entirely gone. In *Yard v. Eland* (b), where a debtor to the wife as executrix, promised to pay to the husband, in consideration of the husband’s giving time, it was held that the husband ought to sue alone, because the wife was not a party to the agreement between him and the defendant. So, here, if the agreement with the wife be considered as struck out of the declaration, she is improperly joined, not being a party to the husband’s promise to forbear.

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 NURSE
 against
 WILLS.

Cur. adv. vult.

DENMAN C. J. now delivered the judgment of the Court. After stating the substance of the two counts in the declaration, his Lordship proceeded as follows:—

It was argued that both the promises on extensions of time in the first count were insufficiently stated; because no promise to the plaintiffs was averred in either; but on the argument, the Court intimated its opinion, that, as the agreement in both cases was stated to be *with* the plaintiffs, the promise must be taken, after verdict, to have been made to *them*.

It was then objected that, even supposing the promise to have been made to the plaintiffs, the count was bad

(a) *Cro. Jac.* 205.(b) 1 *Ld. Raym.* 368.

in

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against
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in law. It was not disputed that, where a wife is the meritorious cause of action, or there is a consideration moving from her, the husband and wife *may* join; that they might have joined in an action upon a judgment obtained by both;—but it was insisted, first, that a joint interest in the wife was not stated with sufficient clearness: and secondly, that, as the consideration in this case was an *agreement* by the wife (jointly with her husband and others), and as she was incompetent to *agree* in point of law, the consideration was altogether void.

The first objection was disposed of by the Court in the course of the argument: it is clear that the cognovit by *Lang* to *all the plaintiffs*, which is recited in, and admitted by, the agreement, is a sufficient admission by the defendant of a joint interest in the wife.

With respect to the second objection, the agreement by the wife is undoubtedly void; but it does not follow that the count is therefore bad. It states an agreement by all, and then a promise by the defendant, in consideration of the plaintiffs not taking out execution until a certain time. Supposing all mention of the *agreement* had been omitted, and the count had stated that the defendant had promised to pay to the plaintiffs, in consideration that they should not nor would take out execution until that time, and that no execution was accordingly taken out, would not such a count have been good? Or, supposing that the mention of the wife's agreement had been omitted, and that of the other parties stated, and that the consideration for the promise had been alleged, as before, to be the forbearance of the plaintiffs to sue out execution;—would such a count be objectionable? In either case, the forbearance by all is
a sufficient

a sufficient consideration for the promise; and it is not rendered less sufficient by the addition of the agreement of all, which, in point of law, would be binding on all the plaintiffs, except the wife. The same reason applies to the other parts of the first count, which state the agreement of all to extend the time, and the promise by the defendant in consideration of the premises, that is, of such agreement and of such *extension*. In each part, there is a sufficient consideration moving from the wife, as well as the other plaintiffs, namely the forbearance by all, and the extension of the time by all; and this cannot be vitiated by the additional averment that all *agreed*; which, on the face of the declaration, would amount, in law, to the agreement of all but the wife. For these reasons, we are of opinion that the first count is good, and if so, the second is equally unobjectionable.

Judgment for the plaintiffs.

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against
WILLS.

WILLIAM TUCKER, surviving Executor of *Tuesday,*
GEORGE TUCKER, *against* EMMELINE TUCKER, *April 30th.*
Executrix of CHARLOTTE TUCKER.

DEBT on bond of the 16th of *November* 1774, in the penal sum of 400*l.*, given to *George Tucker* the testator, by the testatrix *Charlotte Tucker*, then *Charlotte* *S. gave a bond, conditioned for the payment of money. The obligee made C. his executrix and*
residuary legatee, and died. *C.* proved the will, assented to the bequest, and died, not having fully administered, leaving *E.* executrix of the executrix *C.*, in trust for her (*E.*'s) own benefit. A sum due on the bond in the first testator's time remained unpaid. *C.*, during her lifetime, in consideration of a marriage about to take place between her and the father of *S.*, gave a bond to a trustee, conditioned for payment of a sum of money to the use of *S.* if *C.* should marry and survive her intended husband. She did marry and survive him, and the money not having been paid in her lifetime, the trustee's executor sued *E.*, the executrix of *C.*, upon that bond:

Held, that in this action the claim of *E.* upon *S.*'s bond could not be set-off.

Quære, Whether an equitable demand can be set-off at law? Per *Littledale J.*, it cannot.

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Smale, but who afterwards intermarried with *William Tucker*, and survived him. The bond, which was set out on oyer, recited that a marriage was about to be solemnized between *William Tucker* and *Charlotte Smale*, and that the said *Charlotte*, in consideration thereof, and of the settlement to be made upon her by the said *William*, had agreed, in case such marriage should take effect, and she should survive the said *William*, to pay to *George Tucker*, his executors, &c., within twelve months of *William's* death the sum of 200*l.*, upon trust, for the sole use, benefit, &c. of *Sarah*, daughter of the said *William*, her executors, &c.; and the bond was conditioned for the payment of that sum to *George Tucker* as agreed, upon trust for such use, &c., in the above events. The defendant pleaded non est factum, and several other pleas, the last of which was a set-off in substance as follows : —

“ That the said *Sarah Tucker*, by her writing obligatory on the 23d of *May* 1791, acknowledged herself bound to one *William Tucker*, deceased, in the penal sum of 490*l.*, on condition that, if she duly paid certain annual sums during the periods there specified, to the said *William Tucker* in his lifetime, and to his executors, &c., after his death, the said writing obligatory should be void. That there was due from the said *Sarah Tucker* to the said *William Tucker*, on the 25th of *March* 1796, the sum of 160*l.*; that he, by his will, bequeathed all his personal estate to the said *Charlotte Tucker*, and appointed her executrix; that he died in 1817; that she proved the will and assented to the bequest; that at the commencement of this action 200*l.* only was due upon the writing obligatory in the declaration mentioned; and that at that time “ there was, and still is,
due

due and owing to the said defendant as executrix of the said *Charlotte Tucker*, who was executrix of the said *William Tucker*, in trust for the benefit of herself, the said defendant, as executrix of the said *Charlotte Tucker*, for and on account of the said sum of 160*l.* and interest thereon, a large sum of money, to wit the sum of 440*l.*, which said sum of money so due and owing upon the said writing obligatory of the said *Sarah Tucker* exceeds the monies due and owing from the said defendant, executrix as aforesaid, to the said plaintiff, executor as aforesaid, upon the said writing obligatory in the said declaration mentioned, by the condition thereof, &c.”

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To this plea there was a special demurrer, assigning several grounds, and, among others, that it does not appear by the plea that any interest was due or payable to the defendant as executrix, &c. for the said sum of 160*l.*; that it is not alleged in the plea from whom the 440*l.* therein mentioned is due to the defendant, executrix as aforesaid; that it appears by the plea that the said supposed debt of 440*l.*, if any such there be, is due to the defendant as executrix of the said *Charlotte Tucker*, who was executrix of the said *William Tucker*, and is attempted to be set off against a debt due from the said defendant as executrix of the said *Charlotte Tucker*; and that the said plea attempts to set off against the debt claimed by the plaintiff, a debt which cannot by law be set off against it. Joinder in demurrer.

Erle, in support of the demurrer. A mere equitable interest cannot be set off; and the attempt here is to set off one equitable interest against another. The defendant in her plea treats the plaintiff as trustee for *Sarah Tucker*, in respect of the claim advanced in

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this action; and she also, in the same pleading, acknowledges the debt which she sets off to be due to herself in trust. Now, in the first place, she has no right to treat *Sarah* as the real plaintiff on a bond given to *George Tucker* as trustee for *Sarah*. *Bottomley v. Brook* (a) and *Rudge v. Birch* (b) will be cited on the other side; but in those cases the interest of the cestui que trust was not merely equitable. In *Bottomley v. Brook* the bond was given to the plaintiff by the direction of *E. Chancellor*, to secure to her, *Chancellor*, a sum of 100*l.*, which she had lent the defendant, the obligor, and for which, therefore, she had a legal cause of action. The trust was founded on a liability known to the courts of law, and capable of being enforced there. The same observations apply to *Rudge v. Birch*. And the law laid down in those cases has been looked upon with jealousy since. In *Wake v. Tinkler* (c), Lord *Ellenborough* said he was “much more inclined to restrain than to extend the doctrine of those cases;” and *Bayley J.* said “We have nothing to do in this place with any other than legal rights.” In *Carpenter v. Thornton* (d), it was held that a decree in chancery, founded merely on an equitable obligation and not upon any legal liability, could not be enforced by action at law. Secondly, the claim which is the subject of set off in this case is not in respect of any thing actually due to any supposed cestui que trust. *Charlotte* was executrix and residuary legatee; if she had got in all the property and discharged the debts, and there had then been a residue, her legatee might have been a cestui que trust for that residue; but this is not shewn to have been

(a) 1 *T. R.* 621.(b) 1 *T. R.* 622.(c) 16 *East*, 36.(d) 3 *D. & A.* 52.

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ruled. [*Parke J.* In *Scholey v. Mearns* (a), a case is referred to by counsel which is said to have overruled them.] It was also said in argument, in *Coppin v. Craig* (b), that the decision in *Bottomley v. Brook* had been much questioned; but both cases are treated as authority in *Wake v. Tinkler* (c); and *Ashhurst J.* so considers them in *Winch v. Keeley* (d), where they are first cited. In the present case, as in *Bottomley v. Brook* and *Rudge v. Birch*, the plaintiff has the legal interest and no other; the beneficial interest is in the cestui que trust, and that interest was taken notice of by the Court in the two last-mentioned cases. The courts of law did not formerly notice trusts, but of late years, when they have come in question, the disposition has been, not to send parties to the other side of the hall if the justice of the case was manifest. *Carr v. Hinchliff* (e), and other cases of the same class, shew that the Court will take notice of the real debtor, where the action is brought in the name of another party, and will allow a defendant to set off a debt due to him from any person who may be identified with the plaintiff; *Coppin v. Craig* (b) is a similar case. [*Parke J.* The plaintiff in *Carr v. Hinchliff* had allowed another person to appear as the real contracting party. That is the ground of decision there, and in other similar cases, as *George v. Clagett* (g), *Rabone v. Williams* (h).] As to the argument that the defendant here is setting off a debt due in auter droit, the law on that subject is not disputed; but the defendant does not claim as executrix,

(a) 7 *East*, 153.(c) 16 *East*. 36.(e) 4 *B. & C.* 547.(h) 7 *T. R.* 360. note (a).(b) 7 *Taunt.* 243.(d) 1 *T. R.* 619.(g) 7 *T. R.* 359.

to set off what would be assets of the testator: her case is that she has a beneficial interest of her own, which entitles her to set off in her own right.

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DENMAN C. J. It is enough to say that the set-off contended for in this case goes beyond the authorities of *Bottomley v. Brook* (a) and *Rudge v. Birch* (b). *Charlotte Tucker* was only an executrix who was residuary legatee and had assented to the bequest; non constat that she or the defendant might have any beneficial interest at all in the debt attempted to be set off.

LITTLEDALE J. I think *Bottomley v. Brook* (a) was not properly decided, and that under the statutes of set-off the Court can only notice an interest at law. In *George v. Clagett* (c), the defence was not a set-off under the acts of parliament, but was an answer to the action upon the general issue, that the defendant did not undertake or promise, &c. So it is where the contract has been made with a factor, who was the representative of the party afterwards suing, and who might himself have been the plaintiff in the cause. But in the action upon this bond the defendant could have no benefit of set-off except under the statutes, and the present case is not within them.

PARKE J. This case must be governed by the statute 2 G. 2. c. 22. s. 13., which enacts, "that where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the

(a) 1 T. R. 621.

(b) 1 T. R. 622.

(c) 7 T. R. 359.

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testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar," so that in the former case notice be given of the particular sum or debt intended to be insisted on. The object was to prevent cross actions. If the words of the statute had been looked at, *Bottomley v. Brook* (a), and *Rudge v. Birch* (b), would hardly have been decided as they were. At all events the doctrine of those cases is not to be extended; and the present case certainly goes beyond those, for there was no debt due from *Charlotte Tucker* to *Sarah Tucker*, before the bond was given to the plaintiff's testator as her trustee.

Judgment for the plaintiff.

(a) 1 T. R. 621.

(b) 1 T. R. 622.

Tuesday,
May 1st.

BODDINGTON and DAVIS *against* SCHLENCKER.

By the usage in the city of London, a person receiving a check with his banker's name written across it, pays it in at the banker's, and the banker, if he receives it in time, presents it at the clearing-house, and obtains payment the same day. A debtor paid his creditor by a crossed check, and the latter, on the same day, transmitted it to his banker. The banker negligently (as was alleged) omitted to present it at the clearing-house in time for that day (when it would have been paid), and on the next it was dishonoured, the firm on which it was drawn having stopped payment :

ASSUMPSIT for non-payment of a check, made by the defendant, payable to the plaintiffs or bearer. Plea, non-assumpsit. At the trial before Lord Tenterden C. J. at the sittings in London after Trinity term 1832, the facts appeared to be as follows:—Messrs. *Boddington* and *Davis* sold sugars to the defendant, to be paid for on the 28th of March 1831. On Saturday,

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Held, that the supposed negligence of the banker, though it might render him liable to his customer, did not discharge the drawer; the holder of the check being entitled, by the general law, to present it the day after he receives it; and no custom of the city being proved, as between debtor and creditor, that a crossed check, if received by the latter and sent by him to his banker in sufficient time, must be cleared the same day.

5 Bac. 568.

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the 26th of that month, between one and half-past one, the defendant gave them in payment a check dated the same day, drawn by him on Messrs. *John Bond, Sons and Pattisal*, for 830*l.* Across the face of the check he had written the name of *Martin* and Co., who were the plaintiffs' bankers. A check so crossed, if presented by any person but the banker whose name is written across, is not paid without further enquiry. On the same 26th of *March* the plaintiffs paid the check into the hands of Mr. *Stone* at the house of *Martin, Stone, and Co.*, about seven minutes before four o'clock. *Martin* and Co. did not present it at the clearing house in time to be paid that day, but it was presented to Mr. *Pattisal*, and he put his initials upon it. If it had been presented in time for payment that day, it would have been paid; *Bond, Sons and Pattisal* never opened their house after the 26th: they stopped payment on the 28th; the check was therefore not presented, and was never paid, of which the defendant had due notice. *Bond* and Co. afterwards became bankrupt.

The clearing-house at which the bankers' clerks meet to exchange their checks is in *Lombard Street*; *Martin's* and Co. is in the same street. The practice is, that each banker sends to the clearing-house the checks upon other bankers which he receives in the course of the day; they are there delivered to a clerk of the firm on which they are drawn (each house having a clerk in attendance there for the purpose), and he enters them in a book to the credit of the bankers paying them in. When the clock at the clearing-house strikes four, no more checks are taken; and at the end of the day the clerks settle their balances; if a check comes too late
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for the clearing house, it is usually sent to the bankers' on whom it is drawn, and they mark it with their initials, which is considered an undertaking to pay it the next day; it not being usual for bankers to pay each other after four. The defendant gave evidence for the purpose of shewing that, by an established usage in that business, a banker, receiving a check upon another, was bound to pass it at the clearing-house the same day, if there were time; and that, under the circumstances of this case, *Martin, Stone* and Co. had time to clear the check in question. On this point it was stated that a check paid in at a banker's, and requiring to be cleared, must be entered in two books at least, before it is sent out; it has then to go to the clearing-house and to be there entered in a third; if *Martin* and Co. had had only a single check to clear, it would have been in time though paid in as late as seven minutes before four; but Mr. *Stone* stated that, on the 26th of *March* 1831, they had ninety-one checks paid in shortly before, and after, four o'clock, including the check on *Bond* and Co.; and that all of these were too late to be cleared. The question when a check should be considered as too late, or in time to be cleared, did not appear to be settled by any positive rule; but, under the present circumstances, *Campbell* for the defendant contended that *Martin* and Co. had been guilty of laches in not passing the check at the clearing-house, and that having, after such default, accepted the undertaking of *Bond* and Co. for payment on the *Monday*, they had made the check their own and discharged the defendant. Lord *Tenterden*, in summing up, told the Jury that the plaintiffs must suffer for the neglect of *Martin* and Co. their agents, if they

they had not done their duty ; and that the question was, whether or not the check was paid in to *Martin's* and Co. in time for them to have sent it to the clearing-house. He observed upon the evidence of Mr. *Stone*, that if that gentleman spoke the truth, there was not time to pass the check, and then there was no laches on the part of *Martin* and Co., and the defendant was not relieved from liability. The jury found a verdict for the defendant. In the following term Sir *James Scarlett* obtained a rule to shew cause why there should not be a new trial, on the ground of misdirection ; contending, that as the plaintiffs themselves were not obliged to present the check till *Monday*, their agent could not have been guilty of laches in not procuring payment on *Saturday* ; and this should have been stated to the jury.

The *Solicitor-General* and *Comyn* now shewed cause. *Martin* and Co. were guilty of negligence, and the loss must fall upon them, not the defendant. It is true that, by the general custom, if a party keeps a check in his own hands, he need not present it till the following day ; but there is a custom also, that if he receives a crossed check and hands it to his banker, the banker (if it comes in sufficient time) must present it the same day ; the custom, and that only, rules in each case. Its existence is a matter of fact to be determined by the jury. [*Parke J.* Assuming the custom, each way, to be as it is stated, the debtor has no right to presume that one course or the other will be adopted ; it is at the option of the party receiving the check.] If a bill of exchange is payable at a day certain, the holder has his option whether he will present it for acceptance or not in the mean time : but if he does, and acceptance is refused,

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refused, he must give notice to the drawer or indorser, or lose his remedy by omitting to do so. What is due diligence, in general, may be a mixed question of law and fact; but where this depends upon the custom of trade in a particular place, the jury must decide it. *Appleton v. Sweetapple*(a), *Hankey v. Trotman*(b). Local customs have been held good with respect to insurances and may at least have equal authority in the case of bills. [*Littledale J.* How far do you say the custom in this case extends?] To all the bankers in the city who use the clearing-house. *Robson v. Bennett* (c), which may be cited on the other side, is no authority against the defendant, but rather the contrary; for there the custom of the city bankers was complied with as far as the circumstances allowed; the plaintiffs' bankers did not receive the check till after four, and they sent it that day to be marked for payment by the bankers on whom it was drawn, and presented it on the following day at the clearing-house. Lord *Tenterden*, in the present case, considered the custom as established, and only left it to the jury whether there had been sufficient time to clear the check. [*Parke J.* There may be a custom of the nature contended for, as between the banker and his customer, but whether it prevails between the creditor and debtor is a very different question; and that distinction should have been pointed out to the jury.] The check was a bill of exchange payable on demand; if the bankers received it, and neglected their duty in presenting it, they have their remedy against the drawer; but they are bound to give credit to the customer from whom they took it, and

(a) *Bayley on Bills*, 239.(b) 1 *W. Bl.* 1.(c) 2 *Taunt.* 388.

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he, therefore, must be considered as having received payment from the party who drew and delivered it to him. [*Parke J.* If the customer had given the bankers a bill payable on the same day, with a special direction to present it at ten o'clock, in which case it would have been paid, and they had not presented it till five, would that have discharged the drawer? The question is, whether this supposed general custom amounts to any thing more than such a direction by the customer.] A banker is not a mere porter, he is a holder; he would have a lien. A porter or clerk has no interest in the sum delivered to him; he is to carry the very paper or money—he is the mere conduit. But a banker receives a bill or check as his own, subject to an account for the proceeds. *Martin* and Co. were to place the amount of the check to the plaintiffs' credit. If the plaintiffs' account with them had been overdrawn, *Martin* and Co. would have received the amount of this check for their own benefit. [*Parke J.* You have to make out an exception in the case of bankers receiving a crossed check, to the general rule that a check may be presented the day after it is received.] The question turns entirely on mercantile usage, and that contended for, and which has been recognized by the jury, is not unreasonable. The custom of the clearing-house (and presentment there at all is merely matter of custom) is perfectly understood between the debtor and the creditor; the latter knows, if a check is sent to him crossed, that the earliest payment is to be obtained by presenting it, through his banker, at the clearing-house the same day. If he takes the step authorized by custom for obtaining that early payment, he must abide the consequence as between himself and the debtor, if he fails to do all that the custom requires.

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If the banker is in fault, the consequence falls on him and he must seek his remedy against the debtor.

Sir *James Scarlett* (with whom was *F. Robinson*) contra. The Lord Chief Justice misdirected the jury in not telling them that the plaintiffs had a right to present the check at any time during *Monday*. (Here he was stopped by the Court.)

DENMAN C. J. I am of that opinion; and I may also say that, in order to support the defendant's case, the custom relied upon ought to be much better established, as between debtor and creditor.

LITTLEDALE J. The rule in question may exist, as between the banker and his customer, and may be regarded as a convenient practice settled between them rather than as a custom. I must say, although it is now the subject for our consideration, that I think several minutes not a reasonable time for a banker to enter a check and send it to the clearing-house, or else to be liable for the consequences in case of default. But, in all events, the custom contended for is not established as between the creditor and his debtor. *Boddington and Co., as holders of the check, had a right to present it at any period of the day after that on which they received it.* That has been held a reasonable time; and I do not see upon what principle it can be contended that, under the circumstances of this case, the rule established ought not to prevail. *Boddington and Co.* if they had held the check in their own hands, were bound to present it before *Monday*; and, if they had not, the defendant would have been in the same situation as he is now.

PARKE J. There is no doubt that the receiver of a check has till the close of the banking hours on the following day to present it. It is said, however, that there is a particular custom qualifying this rule. The question on that point was not distinctly submitted to the jury, inasmuch as the difference between the usage as affecting the relation of creditors and debtors, and that of customer and banker, was not pointed out: if it had been, I should say that the jury had come to a wrong conclusion on the evidence. The custom contended for, if it could be supposed set out on the record, would appear a very complicated one. It would be a custom as between debtor and creditor, that if the creditor receives a crossed check from his debtor, he is not bound to present it till the following day; but that if he hands it to his own banker on the same day, within a reasonable time before four o'clock for the banker to send it to the clearing-house, and the banker neglects to do so, the creditor is answerable for that neglect, as between himself and the debtor, and the debtor is discharged: or that the banker becomes a holder in this special situation, that if he does not present the check at the clearing-house before four, the debtor is discharged, and the banker must take the consequences of the non-payment. No such custom was established, and it seems to me that the whole of the evidence comes to this point: that if the holder of a crossed check delivers it to his banker on the day he receives it, within a convenient time before the clearing hours, the banker is liable as between him and his customer for neglecting the usual practice, as he would for disobedience of a special direction to present it for payment on that day; but the respective situations of the debtor

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debtor and creditor are not altered. It comes to the case I put during the argument, that if the holder of a bill places it in his banker's hands on the day on which it is payable, with directions to present it at ten o'clock, and he does not present it till five, in consequence of which it is not paid, that does not discharge the drawer. It has been decided that the holder of a check may present it at any time he pleases during banking hours of the day after he receives it; and it is much the better to abide by that general rule as between creditor and debtor.

Rule absolute (a)

(a) The defendant paid the amount of the check, and the cause was not tried again.

WILSON and Others *against* WILLIAM HIRST the Elder, and WILLIAM HIRST the Younger.

6 B. & C. 381
2 M. & C. 371

In an action against B. and C., to recover the balance of a banking account which commenced in 1822 and ended on the 1st of November 1831, the right of the plaintiffs to recover depended on the rate of interest which they were entitled

to charge by the understanding between the parties during their transactions together. The defendants, to prove their case on this point, proposed to call D., who stated on *voir dire*, that he was a partner with B. and C. from 1822 to the 23d of June 1831, and that the partnership accounts as between himself and them were still unsettled. Between the witness's retirement and November 1831, considerable sums had been paid in and drawn out by the defendants, but the general balance had not been materially altered. Since the witness's retirement, B. and C. had asked time of their creditors to pay their debts. General releases *inter alia* of "all demands" from B. and C. to D., and from D. to B. and C. were executed: Held, that by these releases D. was rendered a competent witness.

ASSUMPSIT on the money counts, and accounts stated, and for interest. Plea, general issue. At the trial before Alderson J., at the York Spring assizes, 1832, it appeared that the action was brought to recover the balance of a banking account. The balance in the pass-book on the 1st of November 1831 was 483*l.* 12*s.* 4*d.* for which sum the plaintiffs sought a verdict. The right to recover turned upon the question, at what rate of interest ought to be calculated. The account com-

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menced in 1822 or 1823, and, in the pass-book, interest at 5 per cent. was charged throughout. The defendants proposed to prove that in 1825, after a remonstrance, the plaintiffs agreed to charge only 4 per cent.; that in 1826 it was increased again to 5 per cent., and that in 1827 the plaintiffs promised that they would charge what Messrs. *Beckett* of *Leeds* charged, and they offered to prove that Messrs. *Beckett* charged only 4 per cent. interest. To establish this case, the defendants called *Joseph Hirst*, who being examined on the voir dire, stated that he was a partner with the two defendants during the period when the above transactions occurred, and that the partnership accounts, as between the then partners, were still unsettled. On his examination in chief he stated, that he ceased to be a partner on the 22d or 23d of *June* 1831, at which time the balance due to the plaintiffs did not materially differ from the balance on the 1st of *November* 1831. Since the retirement of the witness from the partnership, sums, to the amount of about 2000*l.*, had been paid by the defendants to the banking-house of the plaintiffs, and nearly the same amount drawn out by the defendants. The defendants had since asked time from their creditors to pay their debts. General releases from the defendants to the witness, and from the witness to the defendants, had been given. The release from the witness to the defendants was of all actions, causes of action, suits, bills, bonds, writings obligatory, debts, dues, duties, accompts, sums of money, judgments, extents, executions, quarrels, controversies, trespasses, damages, and *demands* whatsoever, both in law and equity, or otherwise howsoever, which against the defendants, or either of them, *Joseph Hirst* ever had or might thereafter

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have, &c. It was objected that he was not a competent witness, on the ground that a verdict against the defendants would diminish the assets of the partnership, which was the security the witness had against the debts due from the firm; and it was urged, that the firm were in difficulties, and, if so, then this interest must continue till all the debts due from the firm were paid, and was not affected by the releases. It was said, that this had been so determined by Lord *Tenterden* at Nisi Prius, but the name of the case was not mentioned, and it was not acted upon as an authority. The learned Judge thought that, on principle, the objection was valid, and that the question could not depend on the insolvency of the firm, even if that had been more distinctly made. He rejected the witness, and the plaintiff had a verdict. A rule nisi having been obtained for a new trial, on the ground that the testimony had been improperly rejected, in the course of this term.

Coltman and *Cresswell* shewed cause. *Joseph Hirst* was not a competent witness. The effect of his testimony might be to increase the surplus of the partnership funds, in which he was interested, and the release given by him to his partners does not extinguish his right to that surplus; because it is something which is to arise in future, and it is laid down in *Vin. Abr. Release*, G. 18., that a future right or possibility which is to be released ought to have foundation and original conception, and to be a necessary and common possibility, as stated in *Lampet's case* (a), *Hoe's case* (b), *Briscoe v. Aier* (c), *Neale v. Sheffield* (d). There ought to have been

(a) 10 Rep. 50 b.

(b) 5 Rep. 70 b.

(c) 2 Roll. Abr. 407. tit. Release (A) pl. 23. (d) Yelv. 193.

in addition to the release, an assignment by *Joseph Hirst* of all his interest in the partnership effects. Besides, if the defendants obtained a verdict, and the plaintiffs should afterwards bring an action against *Joseph Hirst*, the judgment entered up on that verdict would be an answer to such action: for if an action is brought against two of three partners, and the defendants recover a verdict, and afterwards a new action is brought against the third partner for the same demand, he may plead the former judgment in answer to the action; because otherwise, if a verdict should be recovered against him, he might call on his partners for contribution, and they would thus be made circuitously to pay the plaintiff, after having obtained a verdict in the action brought directly against them. It is clear, therefore, that the witness has a direct personal interest in the event of the verdict, as he will thereby be furnished with an available defence against any demand by the plaintiffs against him. It may indeed be said that he has another defence; because, according to the principle of *Clayton's case (a)*, the balance due when the witness ceased to be a partner, must be considered as discharged by the subsequent payments which the defendants have made to the plaintiffs. But this is no answer to the objection. It depends on circumstances whether that will be a defence or not; and in consideration of law it cannot but be an advantage and benefit to him that a verdict should be obtained by the defendants, since that verdict will form a clear legal answer to a demand which, it is admitted, did once exist against him, and to which it is by no means certain that he has any other defence; for

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the rule in *Clayton's case* (a) is but a rule of evidence and such evidence is liable to be controverted even in slight circumstances.

F. Pollock and Starkie contra. Joseph Hirst was competent witness, first, because, from the course dealing between the plaintiffs and the defendants, and the payments made, the debt due to the plaintiffs was the witness was a partner, according to the rule laid down in *Clayton's case* (a), is discharged; and as *Joseph Hirst* is no longer liable to the demand of the plaintiffs there is no objection to his testimony. But assuming that to be otherwise, he is not incompetent on the ground of interest. If he be interested at all, it may be either because if the plaintiffs recover a verdict he may be liable to an action by his partners for contribution; or because the judgment and execution in this suit would diminish the partnership funds, in which he has an interest, or because he might still be liable in equity notwithstanding the release. But the release given by the defendants would be an answer to any action brought by them against him for contribution. And then, as to the judgment and execution in this suit diminishing the partnership funds, out of which the joint creditors are to be paid, in which case, it is said that the joint creditors may resort to him; assuming that to be true, he will then become a creditor of his partners, but this will not render him incompetent. If the joint funds are sufficient, or more than sufficient, to pay the debts of the firm, he clearly would be a competent witness. But if those funds be insufficient, and the joint creditors

(a) 1 Mer. 585.

resort to him, then he becomes a creditor of his partners, and they must pay him. The possibility of their being unable to do so is a mere contingency, and cannot affect his competency.

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Thirdly, it may be said that he is still liable in equity to the joint creditors; but he will be so only in the case of the insolvency of his two partners. That is a mere contingency, and is not to be presumed, and no evidence was given to shew that they were insolvent. In *Carter v. Pearce* (a), a co-obligor in a bond to the ordinary under the 22d & 23d Car. 2. c. 10., was held to be a competent witness to prove a tender by the administratrix, and it was said by the Court, that the bare possibility of an action being brought against a witness is no objection to his competency; and *Buller J.* said, that in order to render a witness incompetent, it is necessary to prove that he must derive a *certain* benefit from the determination of the cause one way or the other. It may be questionable whether evidence of the insolvency of the partners would disqualify the witness: but here, at all events, he does not become immediately liable, but only on failure of funds. The case resembles that of a creditor, who is equally liable to loss from failure of a debtor's funds. In *Simons v. Smith* (b), Lord *Tenterden*, in an action against one of several partners, held that the defendant could not, by a release, make him a competent witness; and in *Cheyne v. Koops* (c), Lord *Alvanley* expressed an opinion, that a co-partner could not be made competent by a release from the defendant, because there was an interest which could not be released in the manner proposed; for if the defendant died

(a) 1 T. R. 163.

(b) Ry. & M. 29.

(c) 4 Esp. N. P. C. 112.

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or was insolvent, the plaintiff would have a right to a bill in equity to compel all the partners to contribute; but he however reserved the point, and offered to allow the witness to be released; but the defendant not being present, no release was given. In both those cases, the liability of the witness, as a partner, was admitted. Here it is denied. The case of the witness must be taken as at the time of the dissolution of the partnership. He was then, at most, a debtor or a creditor of the defendants as to the balance which should afterwards appear to be due on either side on the winding up of the affairs. A suit in equity would not lie to compel him to pay any part. It may be questionable, whether this Court will notice an equitable liability, contingent on the default of funds on the part of the defendants. To constitute such a liability, there must first be a failure of the joint funds; and secondly, of separate funds. A court of law will not notice equitable defects of title. *Boyman v. Gutch* (a), *Alpass v. Watkins*. (b)

Cur. adv. vult.

DENMAN C. J., in the same term, delivered the judgment of the Court. After stating the facts his Lordship proceeded as follows. On shewing cause against the rule it was contended on the part of the defendants among other things, that from the course of the dealing between the plaintiffs and the partnership, and the receipts and payments that had taken place, the debt due to the plaintiffs whilst the witness was a partner had been discharged according to the rule in *Clayton's case* (c), and that as the witness was no longer liable to the plaintiffs' demand

(a) 7 Bingham. 379.

(b) 8 T. R. 516.

(c) 1 Mer. 585.

there

there could be no objection to his testimony; but though the payment of money on account generally, without making a specific appropriation, would in many cases go to discharge the first part of an account, yet that rule cannot be taken to be conclusive; it is evidence of an appropriation, only; and other evidence may be adduced which may vary the application of the rule, and therefore we cannot say to a certainty that the debt owing by the witness to the plaintiffs has been discharged, and indeed the defence proceeds upon the ground that the monies paid in are not to be appropriated to the payment of this debt, but only to part of it, viz. that part in which there is no overcharge of interest.

But we are of opinion that the mutual releases which have been executed by the defendants to the witness, and by him to the defendants have made him a competent witness.

It was contended on the part of the plaintiffs that the witness comes to increase the surplus of the partnership effects, and that he is interested in that, and that his release does not release his right to that surplus, as it is something which is to arise in future; and cases were cited to shew that things which rest in contingency and possibility are not released by this general form, which only applies to what exists at the time when the release is given.

There will be found in *Lampet's* case (a) some instances where a release does not extend to things in future; and in *Co. Lit.* 290. and 291., and in 2 *Rolle's Abr.* 201. and several of the following pages, and in the additional cases to *Rolle*, given in 18 *Viner's Abridgment*, beginning at page 299. will be found other instances to

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(a) 10 *Rep.* 50 b.

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the same point; many of these however are upon the construction of single particular words, as *duties*, *debts*, or *actions*.

But in *Littleton*, s. 508. and *Coke's* commentary upon it, 291. *b.* the release of all demands is treated as having a most extensive operation; and in these releases in the present case there is not only the word *demands*, but all the other words which in the various cases are themselves only taken as having a limited operation.

But in fact the claim of any surplus that may arise had an existence at the time of the release.

At that time the partnership had money due to them and they owed money, and amongst the debts claimed from them, was this to the plaintiffs; the amount which depended upon the question of the rate of interest: the facts which raised that question were capable of being ascertained, and there was an ultimate, if not immediate certainty, how the law would attach on such a state of facts. The amount of the balance though uncertain as far as it depended upon the funds to be realized, did not depend on any new state of things to arise thereafter, but merely whether the funds would be available, and it falls within the rule laid down in *Lampet's* case (*a*) that a future right or possibility which may be released, ought to have a foundation at an original inception, and ought to be a necessary and common possibility, which appears to us to be the case here.

It has been urged, that the partnership have asked for time to pay their debts, and that shews them to be insolvent, and the surplus will be less.

We think that forms no objection. In the first place

(a) 10 Rep. 50 b.

the asking for time does not necessarily shew them to be insolvent, though it is a circumstance of suspicion.

In the next place, it does not appear that these debts, in respect of which they have asked for time, are such as the witness is liable to.

But even if these things were so, the releases completely prevent the witness from having any claim upon the partnership effects, and also bar the partnership from having any claim upon him.

And as to the other creditors making a claim upon the witness for any deficiency that may arise if the defendants should turn out to be insolvent, that cannot make the witness incompetent, as far as relates to the plaintiffs.

But the plaintiffs have now made another objection to the witness, which does not appear to have been urged at the trial; viz. that if the defendants should obtain a verdict, and the plaintiffs should afterwards bring an action against the witness for the same debt, that verdict, and judgment upon it, might be pleaded in bar to such an action, and he therefore comes to relieve himself from a liability to pay the debt. But he is equally relieved from liability to pay the debt if the plaintiffs obtain a verdict; because the defendants, having released him, cannot call on him for contribution, and consequently, in a legal point of view, he stands equally indifferent whichever way the verdict is. There is no doubt, however, but the witness would feel himself more safe from future liability if the defendants were to obtain a verdict; but that would only affect his credit, and does not create any legal incompetency.

It is, however, to be observed that the case of *Cheyne v. Koops* (a) seems contrary to this; from the statement in the early part of the case, it appears that mutual

(a) 4 Esp. 112.

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releases were proposed to be given, but that Lord *Alvanley* thought that was not sufficient to make a partner competent; but in the latter part of the case he said, if the defendant gave a release to the witness he would allow him to be examined and a verdict taken subject to the opinion of the Court; but the defendant was not in court, and the witness was not examined.

We think, however, the reasoning of Lord *Alvanley* would not make the witness incompetent, and we are therefore of opinion that *Joseph Hirst* was a competent witness, and that consequently the rule for a new trial must be made absolute.

Rule absolute.

By the stat. 3 & 4 *W. 4. c. 42. s. 26.*, in order to render the rejection of witnesses on the ground of interest less frequent, it is enacted, that if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action on which it shall be proposed to examine him would be admissible in evidence for or against him, such witness shall, nevertheless, be examined; but in that case a verdict or judgment in that action in favour of the party on whose behalf he shall have been examined shall not be admissible in evidence for him or any one claiming under him; nor shall a verdict or judgment against the party on whose behalf he shall have been examined be admissible in evidence against him, or any one claiming under him; and by *s. 27.*, the names of the witness and of the party for whom he was examined are to be indorsed on the record, and entered on the record of the judgment, and such indorsement or entry is made sufficient evidence in any subsequent proceeding in which the verdict or judgment shall be offered in evidence, that the witness was so examined.

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EJECTMENT for twelve acres of land, called *Shatterwell Close*, at *Shatterwell*, in the parish of *Wincanton*, in the county of *Somerset*. At the trial before *Gaselee J.*, at the *Taunton* assizes, 1832, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case : —

Charles Thorn, by his will, dated *September 1829*, duly executed to pass real estates, devised as follows : — “ I give to *John Templeman* my messuage or dwelling house, and mill, with the garden and cottage adjoining the

Testator devised to *J. T.* his messuage or dwelling-house and mill, with the garden and cottage adjoining, with the mill pond, rights, and privileges thereto belonging; and also his messuage, the *Ark Cottage*, garden, and lands at *Shatterwell*, in *Wincanton*, rented by *Mrs. Sly* *o M. & L.*

and others; and his messuage, dwelling-house, shop, garden, and orchard at *Whitehall*, in *Wincanton* aforesaid, rented by *A. B.* and others, with their respective appurtenances. He also devised to *J. T.* his orchard by the side of the river, in *W.*, near the foregoing premises, for all (his testator's) estate and interest therein; charged nevertheless, as to the whole of the premises, with the payment of 500*l.* to his executors in aid of and towards his residuary personal estate.

In ejectment by the devisee, to recover certain lands called *Shatterwell Close*, as part of the lands intended by the testator to pass by the above devise, it was proved by the defendant that the testator was entitled to the following premises at *Shatterwell*, in *Wincanton*.

The principal messuage and two closes of land, rented by *Mrs. S.*

The *Ark Cottage*, occupied by *P.*, and the garden rented by *W. L.*

The messuage, garden, and orchard called *Whitehall*, rented by *A. B.* and *C. D.*, and *Motion's Orchard*, described in the will as *the little orchard*, occupied by the testator himself.

These premises, with the exception of *Motion's Orchard*, were conveyed to the testator in 1828, by one conveyance, and were therein described to comprise a messuage, *Ark Cottage*, a garden, and closes, by name, formerly in the occupation of, &c., but then untenanted; and also a messuage called *Whitehall*, with a garden and orchard, rented by *A. B.*

Motion's Orchard was purchased by the testator in 1827, before which time it had been united with the foregoing premises, in the possession of one person.

The testator in 1824 purchased other premises in *Shatterwell*, and at the date of his will and of his death, their situation was as follows: *Shatterwell Close* was rented by *W.* with several other closes, at the rent of 170*l.* per annum. An orchard, called *Cold Bath Orchard*, was also rented by *W.*, but under a separate rent. A messuage adjoining was rented by the said *W. L.*, and *Lewis's* orchard was occupied by the testator himself. No part of the premises purchased in 1828, had ever been let with any part of the premises purchased in 1824, except the garden rented by *W. L.*; and all these latter premises were separated from the former by a lane, from which there was no entrance to *Shatterwell Close*.

Held, that all these facts were admissible in evidence, but that they raised no ambiguity as to the meaning of the devise of *the messuage, the Ark Cottage, garden, and lands at Shatterwell, in Wincanton, rented by Mrs. Sly and others*, that being sufficiently explicit to pass all the lands of the testator situate at *Shatterwell* in *Wincanton*, rented by any tenant.

same,

5 Bac. 90.

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same, in *Wincanton* aforesaid, with the mill pond, right and privileges thereto belonging; and also my messuage the *Ark Cottage*, garden and lands, at *Shatterwell*, *Wincanton* aforesaid, rented by Mrs. *Sly* and others, and my messuage, dwelling house, shop, garden, and orchard at *Whitehall*, in *Wincanton* aforesaid, rented by *John Tulk* and others, with their respective appurtenances, to hold to the said *John Templeman*, his heirs and assigns for ever, charged as after mentioned; and also give to the said *John Templeman* my little orchard by the side of the river in *Wincanton* aforesaid, near the foregoing premises, for all my estate and interest therein charged, nevertheless, as to the whole of the premises with the payment of 500*l.* within twelve months after my decease, to my executors and trustees, in and of and towards my residuary personal estate. All of my messuages, lands, tenements, and hereditaments, also all my monies and securities for money, goods, chattels, and personal effects, as well as the said 500*l.* to be so paid as aforesaid by the said *J. Templeman*. I give, devise, and bequeath unto my friends, *John Martin* and *John Richards*, to hold to them, the said *John Martin* and *John Richards*, and the survivors of them, and the heirs, executors, administrators, assigns of such survivors, upon trust for sale to discharge my debts and legacies."

The testator died on the 9th of *January* 1830. At the date of his will and at his death he was entitled to certain premises at *Shatterwell* in *Wincanton*. Of these there were, on the eastern side of *Shatterwell Lane*, at the time of the will:—

1. The principal messuage. This, and
2. Two closes of land, were rented by Mrs. *Sly*, and

had taken them from the testator at *Christmas* 1828, at 30*l.* per annum, and who, in 1829, after mowing the grass, let the after-grass to her son *William Sly*, until *Christmas*, for 3*l.*

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3. The Ark Cottage, occupied by *Prior* and another; the former paying the rent to the testator, and the latter being *Prior's* under-tenant.

4. The garden rented by *William Linton*, who became tenant of it within a year before the testator's death, at an annual rent of 10*s.*

5. The messuage, garden, and orchard called *Whitehall*, rented by *Tulk* and *Daw*, who were the sole tenants of them at the time of the conveyance thereof, hereinafter mentioned; and

6. The orchard called *Motion's Orchard*, described in the will as "the little orchard" by the side of the river, near the foregoing premises, which was occupied by the testator himself.

The first five parcels were purchased by the testator of Mr. and Mrs. *Surrage* in 1828, and were conveyed by one conveyance, and described as "all that messuage or dwelling house, formerly divided into two tenements, lying in *Wincanton* aforesaid, at a place called *Shatterwell*, near *Grove Hill*, with a bucking-house, garden, and stable thereto belonging:" one acre and three roods of ground called *Willis Hill*, a cottage called *Ark Cottage*, and a close called *Crooch Grove Close*, all which premises were particularly described in the conveyance, and were stated to have been formerly in the possession of certain persons therein named, but to be then untenanted: and also all that messuage, &c. commonly known by the name of *Whitchall*, with the outhouses, &c., garden, and orchard thereto adjoining and belonging,
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situate at the town's end, towards *Bruton*, in the par of *Wincanton* aforesaid, containing, by estimation, acre, formerly in the possession of, &c., and now of *J Tulk* and others as tenants; all which messuages, are situate in the parish of *Wincanton* aforesaid." The remaining portion called *Motion's Orchard*, was purchased by the testator in 1827, of Mrs. *Jane Pitman*. The whole six parcels, for some years before, and down to 1826, belonged to one *Pitman*, and upon his dying intestate, *Motion's Orchard*, being leasehold, passed to his mother, Mrs. *Jane Pitman*, and the other five parcels, being freehold, to his heir at law, Mrs. *Surrage*.

The whole of the premises on the western side of *Shatterwell Lane* were purchased in 1824 by the testator, at the time, of *W. Messiter*, and for some years before, and at the date of the testator's will, and of his death, were occupied as follows:—First, *Shatterwell Close* was rented by *Charles Warren*, under a lease dated 1821, in which the testator demised to him a farm-house, garden and orchard, and several closes by name, and, among others, *Shatterwell Close*, at the rent of 170*l.* per annum. Secondly, the orchard, called *Cold Bath Orchard*, was also rented by *Charles Warren*, but under a separate rent. Thirdly, the messuage adjoining was rented by *William Linton*; and fourthly, *Lewis's Orchard* was occupied by the testator himself. No part of the premises on the western side of *Shatterwell Lane* had ever been let with any part of the premises on the eastern side, except the small garden on the eastern side which *Linton*, the tenant of the messuage, rented for about three quarters of a year as aforesaid.

The usual entrance to *Shatterwell Close*, going from *Motion's Orchard*, from which it is separated only

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Shatterwell Lane, is not by that lane, but by another lane called *Wright's Lane*, and by going round *Lewis's Orchard*; the lands abutting on the west side of *Shatterwell Lane*, opposite *Motion's Orchard*, being too steep to allow of any passage across the lane into *Shatterwell Close*.

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In any case, there would be a small deficiency of assets for the payment of debts and legacies under the will. If *Shatterwell Close*, and the other premises, claimed by the lessor of the plaintiff, did pass by the devise to him, the estimated deficiency would be very considerable.

The question for the opinion of the Court was, whether the above facts were admissible in evidence on the part of the defendants; secondly, whether, under the devise in question, *Shatterwell Close* passed to the lessor of the plaintiff. The case was argued this term.

Follett for the plaintiff. Evidence to shew of what description the premises were, and that they were actually occupied by tenants, so as to bring them within the description of the words of devise, was admissible; but evidence of a description of the premises in former conveyances was not admissible to shew that the testator could not intend the land on the west side of *Shatterwell Lane* to pass by the devise of his "lands in *Shatterwell*, rented by Mrs. *Sly* and others." To satisfy the devise, two things are necessary: first, that the property should be situate at *Shatterwell* in *Wincanton*; secondly, that it should be rented by Mrs. *Sly* or other persons. Now all the closes here sought to be recovered were rented by some person. There is, therefore, no ambiguity on the face of the will. In 2 *Stark*. 2d edit. 561. it is said, "where a subject matter exists which satisfies the terms
of

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of the will, and to which they are perfectly applicable, there is no latent ambiguity, and no evidence can be admitted for the purpose of applying the terms to a different object;" and on this principle, the Court of Common Pleas, in *Doe v. Oxenden* (a), decided that parol evidence was not admissible to shew that a testator by a devise of his estate at *Ashton*, intended to devise his maternal estate, consisting of two manors in the parish of *Ashton*, and one in the adjoining parish. In *Miller v. Travers* (b), the testator devised his freehold and real estates in the county of *Limerick* and city of *Limerick*. He had no real estate in the county, only a small one in the city, but had large real estate in the county of *Clare*. A draft of the will was offered in evidence, to shew that he intended to pass his estate in *Clare*, and Lord Chancellor Brougham, assisted by Lord Lyndhurst and Tindal C.J., decided that the evidence was inadmissible. The latter, in delivering his opinion, divides the cases in which parol evidence is admissible into two classes; the first, where the description of the thing devised or of the devisee is clear upon the face of the will, but upon the death of the testator it is found that there are more than one estate or subject-matter of devise, or more than one person whose description follows out and fills the words used in the will; the second, when the description contained in the will of the thing intended to be devised, or of the person who was intended to take, is true in part, but not true in every particular. The present case comes within neither of those classes. Assuming that all the evidence be admissible, it does not shew that the testator did not in-

(a) 3 Taunt. 147. See 4 Dow. P. C. 65.

(b) 8 Bing. 244.

to devise all his lands at *Shatterwell* to *Templeman*. If the argument on the other side were to prevail, the will would operate, not as a devise of all the testator's lands at *Shatterwell* in *Wincanton*, but of all his property at *Shatterwell* in *Wincanton*, situate on one side of the ane.

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Erle contrà. *Shatterwell Close* did not pass to the lessor of the plaintiff by the devise of lands at *Shatterwell* in *Wincanton*, rented by Mrs. *Sly* and others. The testator, by those words, does not make a general devise of all his lands within certain local limits, but refers to particular lands within those limits, which can be ascertained by the description in the will. If he had intended all his rented lands in *Shatterwell* to pass, it would have been superfluous to specify the messuage, the *Ark Cottage*, and the garden, as the devise of all lands would have been sufficient without that description; and besides, if he had intended all lands, by whomsoever rented, it would have been superfluous to specify Mrs. *Sly* and others. These extrinsic facts were given by the testator to indicate what particular lands in *Shatterwell* he intended; and if the construction of the plaintiff is adopted, no effect will be given to these facts. The situation of the clause is important. It is placed between two devises of property described with great minuteness. In the first, the testator devises his messuage or dwelling house and mill, with the garden and cottage adjoining the same, in *Wincanton* aforesaid, with the mill-pond, rights, and privileges thereto belonging. The word *lands* does not occur here, nor is the subject matter of the devise described by stating the name of the occupier. Then comes the devise in

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question “ of *my messuage, the Ark Cottage, garden, and lands at Shatterwell in Wincanton*, rented by Mrs. Sly and others.” Here, the testator evidently meant, when he used the word *lands*, to denote one particular property or estate at *Shatterwell*, of which Mrs. Sly was principal tenant, and of which other persons rented some parts. He did not intend to devise all he possessed within any specific local limits. Then followed a third devise of the messuage, garden, and orchard at *Whitehall*, described specifically and by the name of an occupier; and the three devises are united together by the words “ with their respective appurtenances.” These circumstances, of the devise in question being placed between two devises of specific estates, and being referred to by the testator as united with them in a class, favour the construction which would confine the devise also to a specific estate, satisfying the whole description, rather than a construction which would extend it to all lands generally within the local limits, although dispersed among various estates.

Now, it is a general rule, that where the subject of a devise is described by reference to some extrinsic fact, extrinsic evidence is admissible to ascertain the fact, and so ascertain the subject of the devise; the object of the evidence, in that case, being to ascertain what is included in the description which the testator has given of the thing devised. *Sandford v. Raikes* (a). The word *lands*, in the devise in question, must be construed with reference to the words *messuage, Ark Cottage, &c.* and to the tenancy of Mrs. Sly. Many cases establish this, where there is any doubt as to the extent of the thing devised by a will, or devised, or sold, it is matter

(a) 1 Mer. 653.

extrinsic evidence to shew what is included under the description as parcel of it. *Doe v. Burt* (a), *Doe v. Collins* (b), *Goodtitle v. Paul* (c), *Marshall v. Hopkins* (d), *Doe v. Bower*. (e) On the other hand, where a testator devises all his property within certain specific local limits, that is considered in effect as a description of the property by a local name, and then parol evidence is not admissible to shew that any property beyond the specified limits was intended to pass. *Tuttesham v. Roberts* (g), *Doe v. Greening* (h), *Doe v. Lyford* (i), *Doe v. Oxenden*. (k) But here the devise is not of that description.

There is another class of cases, where the description consists of different parts, and all the parts are material to render it certain. Thus, in *Bro. Abr. tit. Grants*, pl. 92., it is said, “if a man grants all his land in D., which he has of the gift and feoffment of J. S., there nothing shall pass but that which he has of the gift of J. S. But if he grants all his land in D. called N., which was J. S.’s, then his land called N. shall pass, though it never was J. S.’s, by reason of the special name called N.,” and the same rule is adopted in *Plowden*, 191., *Doddington’s case* (l), *Doe dem. Beach v. The Earl of Jersey* (m), and *Goodtitle v. Southern*. (n)

The testator here has not described the tenements by any proper name, nor has he used words which shew an intention to pass all his lands within the local limits of *Shatterwell*, but he devises his messuage and lands at *Shatterwell*, rented by Mrs. Sly and others; viz. specific

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(a) 1 T. R. 701.

(c) 2 Burr. 1089.

(e) 3 B. & Ad. 453.

(h) 3 M. & S. 171.

(k) 3 Taunt. 147.

(m) 1 B. & A. 550. 3 B. & C. 870.

(b) 2 T. R. 498.

(d) 15 East, 509.

(g) Cro. Jac. 21.

(i) 4 M. & S. 550.

(l) 2 Rep. 33 a.

(n) 1 M. & S. 299.

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lands at *Shatterwell*, Mrs. *Sly* being the tenant of principal part of them, and other persons of the mainder; he does not say all my lands at S., by who soever rented. The evidence of occupation was undoubtedly admissible and most material. It shew that the messuage and two closes, being the principal part of the premises on the eastern side of *Shatterwell Lane*, were rented by Mrs. *Sly*, and that the *Ark Cottage* and garden were rented by other persons, and that they, consequently, satisfy all the words of the will. The testator afterwards gives to the same devisee premises at *Whitehall*, which is situate in *Shatterwell*. According to the plaintiff's argument, that gift unnecessary; for those premises had been already devised by him, by the gift of those lands at *Shatterwell* in *Wincanton*, rented by Mrs. *Sly* and others. Evidence of the mode by which the testator acquired the property was also admissible; and here it appears that he acquired, by one conveyance, in 1828, the messuage, *Ark Cottage*, garden, and lands, at *Shatterwell* (afterwards rented by Mrs. *Sly* and others), and the messuage at *Whitehall*: and in the conveyance to him they were described as making two separate portions or estates, the first being described as a messuage or dwelling-house at *Shatterwell*, a cottage called *Ark Cottage*, with a garden and certain fields by name, in the deed stated to be untenanted, though at the date of the will they were tenanted by Mrs. *Sly* and others; the second portion or estate being described in the deed as a messuage, dwelling-house, garden, and orchard at *Whitehall*, rented by *Tulk* and others; which description is adopted in the will. It was natural, if the testator intended to devise the property which he purchased in 1828, that he should describe it as consisting of

same parcels by which it was described in the deed of conveyance to him, and also, that he should in his will give a further description of the first parcel, by adding the name of the principal tenant; and he may properly have added the word *others*, inasmuch as some small portion of that property was not in her occupation. If the testator had intended to pass *Shatterwell Close*, which forms part of a large farm running into another district, and rented at 170*l.* a year, he would surely have described it by adding the name of the tenant in whose occupation it was. It is not to be supposed that he intended to separate so large a property from the rest of the estate, without more specific words. The fact, also, of *Motion's Orchard* being described in the will as "near the foregoing premises," confirms the construction contended for by the defendant; for it is contiguous to the estate at *Whitehall* and the estate rented by *Tulk* and *Daw*; whereas it is divided from *Shatterwell Close* by a road and a steep hill, so that to go from *Motion's Orchard* to *Shatterwell Close*, a considerable circuit is necessary; whereas the passage from it to either of the other estates is immediate. It must also be remembered that if *Shatterwell Close* does not pass by the will, the residue of the property is insufficient to satisfy the debts and legacies charged upon it. A similar argument was adopted by the Court in *Doe v. Lord Lucan* (a).

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Follett in reply. It is not disputed that evidence is admissible to apply the description in the will to the subject matter of the devise; but when that is done, extrinsic evidence is not admissible to shew that pro-

(a) *East*, 448.

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perty answering that description did not pass. Here the terms of the devise shew that the testator intended his whole property in *Shatterwell* to pass. It is said that the word *lands* applies to some specific land rented by Mrs. *Sly* and others. Mrs. *Sly* rented the messuage and two closes of land only, not the *Ark Cottage* and garden. But the devise is of *the messuage*, the *Ark Cottage*, garden, and lands at *Shatterwell*, rented by Mrs. *Sly* and others. According to the argument on the other side, the clause must be read, “the messuage the *Ark Cottage*, and garden, rented by Mrs. *Sly* and others, and the land rented therewith;” but, construing the devise in that manner would be altering the will. Then it is argued, that inasmuch as *Whitehall* situate at *Shatterwell*, the devise of the messuage *Whitehall* was unnecessary, because it passed by the former clause. But though *Whitehall* may be local situate within *Shatterwell*, in common parlance it may not be so considered. [*Denman C.J. Whitehall and Shatterwell* might both be hamlets.] Then as to the devise of *Motion's Orchard*, “near the foregoing premises,” it is, in fact, near all the property in question. As to the alleged deficiency of assets for payment of debts and legacies, that cannot affect the construction of this devise. Other lands, besides *Shatterwell Close*, are devised by the residuary clause.

DENMAN C. J. The lessor of the plaintiff claims to be devisee of lands, under the following clause in the will of *Charles Thorn*:—“I give to *John Templeman* my messuage, the *Ark Cottage*, garden and lands, at *Shatterwell* in *Wincanton* aforesaid, rented by Mrs. *Sly* and others. The plaintiff makes out a *primâ facie* claim to the particular

particular lands in question when he shews that they are lands at *Shatterwell* in *Wincanton*, which, at the date of the will, belonged to the testator, not being, however, in his occupation, but in that of a tenant. It is said there are clauses in the will which shew the testator could not have intended all his lands at *Shatterwell*, except those in his own occupation, to pass; but I do not see any which are inconsistent with the devise of all the lands at *Shatterwell*. Then evidence is offered to shew from extrinsic circumstances that there is an ambiguity in the devise, and almost any evidence would be admissible for that purpose. But the question still is, whether the evidence adduced with this view be clear enough for us to say, that the testator intended some of the land at *Shatterwell*, in the occupation of tenants, not to pass. There are indeed circumstances which make it appear probable, but they all admit of an answer; and there is nothing, in my opinion, to raise such an ambiguity as would make the evidence admissible for the purpose of narrowing the construction of the devise. I think, therefore, that all the lands in question, being lands at *Shatterwell* in *Wincanton*, rented by some person, passed to the lessor of the plaintiff.

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LITTLEDALE J. I think it not improbable that if the testator had been asked whether he intended the closes on the western side of the lane to pass by the will, he would have answered in the negative. But the question here, is not what his actual intention was, but what is the intention expressed in his will, or in other words, the meaning and effect of the terms used? It seems to me that the lessor of the plaintiff is entitled to recover. The first question raised, is, whether the facts stated in

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the special case are admissible in evidence on the part of the defendant; I think that any evidence was admissible, to shew what was the state of the testator's property at the date of his will, and from whom it was purchased; but I think that that evidence when admitted, is not sufficient to create any ambiguity as to the meaning of the will. The testator, after devising my messuage, &c., proceeds, "and also my messuage, *Ark Cottage*, garden, and lands at *Shatterwell*, rented by Mrs. *Sly* and others; and my messuage, dwelling-house, shop, garden, and orchard, at *Whitehall* in *Wincanton*, rented by *John Tulk* and others." The question turns on the first of those clauses; if the words there had been, "all my lands at *Shatterwell*," it is quite clear that the lands in question, being situated in *Shatterwell*, would have passed. The absence of the word *all* makes a difference; the clause should be read as if he had devised all his lands at *Shatterwell* in *Wincanton* rented by Mrs. *Sly* and others. It has been argued from the location of the words that the testator intended to devise the lands in *Shatterwell*, of which Mrs. *Sly* was the tenant of the principal part, and other persons tenants, of smaller; but I think there is no legal ground for making such a distinction. In the clause in question, the messuage is the first subject matter of devise, and then *Ark Cottage*, and garden are mentioned before "lands." The word messuage is separated from the word lands by the intervening words *Ark Cottage* and *Garden*, and then Mrs. *Sly* is named before others, because the messuage which she rented had been first named; the word *lands* being separated from the word messuage, cannot be confined in construction to lands in the occupation of Mrs. *Sly*.

Then it is contended by the defendant, that if the testator intended all his lands in *Shatterwell* to pass by the first devise, there was no occasion for a specific devise of his messuage, &c. at *Whitehall*. But that argument fails for two reasons: first, because *Whitehall* is not mentioned there as the name of the property devised, but as the name of some hamlet or district, which he called *Whitehall* in *Wincanton*, as he speaks of *Shatterwell* in *Wincanton*; secondly, he does not merely use the same words as in the devise of property at *Shatterwell*, but the words *messuage, dwelling-house, shop, garden, and orchard*: lands are not mentioned. Then it is observed that the testator, by another clause, devises his little orchard, by the side of the river at *Wincanton*, "near the foregoing premises." But that orchard is as near to the property on one side of the lane as the other.

It is also said, that unless *Shatterwell Close* passes to the defendant, there is not sufficient to satisfy the residuary devise; but the testator had other lands and property to which that clause applies. It is, however, unnecessary to rely on this, the expressions of the will being otherwise sufficiently clear.

PARKE J. I am of opinion that the lessor of the plaintiff is entitled to recover. The first question is, whether the parol evidence was admissible. I think it was. It may be laid down as a general rule, that all facts relating to the subject matter and object of the devise, such as that it was or was not in the possession of the testator, the mode of acquiring it, the local situation, and the distribution of the property are admissible to aid in ascertaining what is meant by the words used in the will.

Then,

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Then, as to the construction of those words, we are to consider, not what the testator intended to insert in the will, but what the words actually inserted in it do pass. If I were at liberty to conjecture, I should probably come to the conclusion that the testator did not intend to pass property on the western side of the lane; but, taking the clause by itself, there can be no doubt, that under a devise of the testator's lands at *Shatterwell*, all lands answering that description, both on the eastern and western side of the lane, would pass. The testator goes on to describe the lands he intended to pass as lands rented by Mrs. *Sly* and others. The lands in question were rented by others; therefore, in ordinary construction they would pass by the words of the clause. Then what is there to oblige us to put a different construction on the word "lands" in this case? It is said, that from the context we ought to do so, and that the testator could not mean all his lands in *Shatterwell* to pass, because he afterwards makes a specific devise to the same devisee of his lands at *Whitehall*, which is in *Shatterwell*; but it is probable that the testator may have used the word *Whitehall* as the designation of a district. At all events, the wording of that clause is not sufficient to alter the meaning of the word "lands" in the former one. Nor is there anything in the extrinsic circumstances here to lead us to put a different construction on the word; to warrant such a construction, it must appear that, without it, there would be some absurdity or incongruity, or the words would be insensible; but there is nothing of that kind here to oblige the Court to understand by the words *lands at Shatterwell* something different from their natural meaning.

Postea to the plaintiff

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JOHN RICHARDSON *against* JOHN WATSON.Friday,
May 3d.

ACTION for use and occupation by the defendant of two closes of land, situate in the parish of *Kirton* in the county of *Lincoln*: plea, general issue. At the trial before *Bayley B.* at the *Lincolnshire* Spring assizes 1832, the jury found a verdict for the plaintiff for 12*l.* 11*s.* 7*d.* subject to the opinion of this Court on the following case:—

The plaintiff was entitled as heir at law of one *William Richardson* (who had theretofore demised the said closes by parol from year to year to the said *John Watson*), to recover 12*l.* 11*s.* 7*d.* for the half year's rent of the same two closes, provided they did not pass by the will of the said *William Richardson*, to his great nephew, one other *John Richardson*.

The will of the said *William Richardson*, dated the 17th of *April* 1827, is in the following terms.

After giving and devising certain estates at *Imingham*,

J. R., his heirs and assigns for ever. At the time of making this and the next mentioned will, and of the testator's death, *J. W.* occupied two closes in *Kirton*, as tenant to the testator.

In 1825 the testator had made another will, whereby he devised "the close in *K.*, occupied by *J. W.*," to certain persons, in trust for his said great nephew *J. R.*, when he should attain the age of twenty-three years. The attorney who made that will, stated he received instructions in writing from the testator, to give to *J. R.* all the land in *Kirton*, occupied at that time by *J. W.*, but received also verbal instructions, whereby the testator described the land in the occupation of *J. W.* as a close: that the testator not being certain what land *J. W.* occupied, inquiry was made of a person supposed to know, who stated to the witness, in the presence of the testator, that it was all in one close; and that the witness in consequence of that information, so described it in the will of 1825:

Held, that from the use of the word *closes* in other parts of the will of 1827, the word close in the devise to *J. R.* must be construed in its ordinary sense as denoting an inclosure, and as the parol evidence shewed that the testator had two closes in *Kirton* in the occupation of *J. W.*, it was uncertain which was intended, and in the absence of the evidence as to the former will, the devise would have been void for uncertainty.

Secondly, assuming that this evidence was admissible, (which was very doubtful,) that did not remove the ambiguity; but left it uncertain what the testator intended to pass under the name of "the close in *K.* in the occupation of *J. W.*," and consequently that the devise was at all events void for uncertainty.

Testator by *J. W.* 365
will, dated 4.4.27 21
April 1827,
after devising
his closes,
lands, heredit-
aments, and
real estates at
H., in the oc-
cupation of
J. W., to the
use of *P. R.*,
his heirs and
assigns for
ever, devised
his messuage or
tenement,
closes, lands,
hereditaments,
and real estates
situate at *Kir-*
ton, which were
then in the
occupation of
J. A., and also
the close in
Kirton afore-
said, then in the
occupation of
the said *J. W.*,
to the use of his
great nephew

East 8 Bac. 485.
5— 90.
1. M. & C. 391.

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 ———
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East Halton, Killingholme, and Halbrough, to his wife (now his widow) Catherine, for life, and subject thereto his estate at Imingham to his great nephew William Richardson in tail, and his estates at East Halton, Killingholme, and Halbrough to him in fee, the testator gave and devised "All that his messuage, or tenement, closes, lands, hereditaments, and real estates, situated lying, and being at Hibaldstow in the said county Lincoln, which were then in the occupation of John Watson, unto and to the use of his great nephew Percival Richardson, his heirs, and assigns, for ever," and he then devised as follows: — "I give and devise all that my messuage, or tenement, closes, lands, hereditaments, and real estates situate at Kirton in the said county Lincoln, which are now in the occupation of Joseph Atkinson, and also the close in Kirton aforesaid, now in the occupation of the said John Watson, unto and to the use of my said great nephew John Richardson, his heirs, and assigns for ever. I give and devise all that my messuage or tenement, closes, lands, hereditaments, and real estates situate at Kirton aforesaid, which are now in the occupation of Thomas Curtis, unto and to the use of my said great nephew Thomas Richardson, his heirs, and assigns for ever. I give and devise all that my messuage or tenement, closes, lands, hereditaments, and real estate situate at Kirton aforesaid, which are now in the occupation of Joseph Wharton, unto and to the use of my said great nephew Richard Richardson, his heirs, and assigns for ever." There was no residuary devise.

For two or three years previous to, and in the year 1825, and thence until the death of the said William Richardson, the said John Watson occupied two closes in the parish of Kirton, as tenant of the said William Richardson.

Ric

Richardson, being the same two closes for the use and occupation of which the present action was brought. One of the said closes contains ten acres three roods, and has always been called *Low Firwells*; the other contains eleven acres, one rood, and has always been called *Low Sweet Hills*. These were separated from each other by several intervening properties.

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Evidence was received on the part of the defendant, of a will made in the year 1825, in which the devise corresponding to that on which the present question arises, is as follows: “ And I give all those messuages, cottages, farms, closes, lands, tenements, and hereditaments whatsoever, situate and being in *Hibaldstow* and *Kirton* in the said county of *Lincoln*, as well freehold as copyhold according to the customary nature and quality of the same estates, unto the said *William Teal Welfitt*, *Samuel Welfitt*, and *Charles Morris* and their heirs, to hold to the use of them the said *W. T. Welfitt*, *Samuel Welfitt*, and *Charles Morris*, and their heirs upon the trusts and to and for the said intents and purposes hereinafter declared of and concerning the same, that is to say: As to a farm and lands in *Hibaldstow* in the occupation of *John Watson*,” to certain uses therein mentioned: “ And as to, for, and concerning all that messuage or tenement, with the closes, lands, and hereditaments situate and being in *Kirton* aforesaid, now in the occupation of *Joseph Atkinson*, together with the close in *Kirton* aforesaid, occupied by the said *John Watson*, upon trust for my said great nephew *John Richardson*, when he shall attain the age of twenty-three years, and for the heirs of his body lawfully issuing.” The testator then proceeds in the said will of

1825

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enquire whether, under the terms “*the close in the possession of Watson*,” parol evidence would be admissible to shew which was intended, because all the parol evidence, if admitted, goes to shew that both were equally intended. Nor does it come within the second class of cases, as a description accurate in part and inaccurate in part, for in order to make out the testator’s intention to devise any of the premises in the occupation of *Watson*, the word *close* in the will must be changed from the singular to the plural; an entire new description must be substituted; and that would be calling in extrinsic evidence to introduce into the will an intention to devise a plurality of closes; the intention apparent on the will being to devise a single close. Then, after rejecting a part of the description, there is not sufficient to ascertain the thing devised. The general expression in Lord *Bacon’s Maxims*, as to latent ambiguity (*a*), is very much limited by his examples. He says there are two kinds of “*ambiguitas latens*,” first, where one name and appellation doth denominate divers things, and, secondly, where the same thing is called by divers names. In the instance which he gives of the first, namely, “I grant my manor of S., and I have *North S.* and *South S.*,” the name S. would include both *North S.* and *South S.*: “the general intent,” he says, “includes both the special, and therefore stands with the words.” But, here the words “the close” will not apply to either exclusively or to both. In *Altham’s* case (*b*), Lord *Coke*, speaking of cases of averment of matter of fact, de hors a fine, says, that such averment is good, which well stands

(a) See 4 *Bacon*, 79, 80. Ed. 1803.(b) 8 *Rep.* 155 a. 1.

with the words of the fine." And in *Druce v. Denison* (a), Lord Eldon says, "When a man devises to his son *John*, and happens to have two sons of that name, supposing one to be dead, there is a latent ambiguity, letting in parol evidence, but parol evidence perfectly consistent with the description in the instrument," Here the result of the parol evidence is to shew that "*the close*" means two closes of different names, and separated from each other: that is not consistent with the words of the will. If the parol evidence had shewn that only one close was meant, as if the testator was seised of one only, then the result would have stood with the will. It may be said the devisee has an election, and that the will operated as a devise of whichever close the devisee should please. Thus, when a man grants ten acres of wood in a particular parish, where he has a hundred acres: the presumption then is, where the thing is nominated by quantity, that the intention of the grantor was indifferent which ten acres the grantee should take. Or when, after a recital in a deed that he has *North S.* and *South S.*, he leases *unum manerium de S.* *Bac. Max.* 80. Here no such intention of the testator is disclosed.

But, secondly, the parol evidence of what passed in 1825, when the testator made a former will, is inadmissible: the wills in 1825 and 1827 are not facsimiles of each other; they are not drawn by the same person: even in the very clauses relating to property in the possession of *Watson* the language is different. Besides, declarations of the testator not made at the time of the making of the will are inadmissible, *Thomas v. Thomas* (b). The Court will be very cautious in ad-

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(a) 6 Ves. jun. 397.

(b) 6 T. R. 671.

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1825 to carve out by name the other estates so devised the trustees. The attorney who made the will in 1825 but who did not make the will in 1827, stated that he received instructions in writing from the testator for the will of 1825, which he produced, and which, among other instructions, contained the following:—"I also wish the farm in *Joseph Atkinson's* occupation to be the property of *John Richardson*, my great nephew, taking also the land in *Kirton*, occupied at this moment by Mr. *Watson* (all) only to be entered on at twenty-three years. The witness stated in explanation of his having mentioned in the will only one close in the occupation of *Watson*, that the testator gave him certain verbal instructions for the will, and in those verbal instructions (which the witness took down in writing, and afterwards destroyed that writing) described the land in the occupation of *Watson* as a "close," but added, that he hardly knew what *Watson* occupied. The will was made from the written and verbal instructions. That he, the witness, from what passed, understood it to be the testator's intention to give all the land in the occupation of *Watson*, to his great nephew *John Richardson*. That in consequence of the testator not being certain what land *Watson* occupied, one *Neale*, who was supposed to know the testator's land, was called in, and asked by the witness in the testator's presence, whether the land in the occupation of *Watson* was in one close or two, and that *Neale* said it was all in one close, and that he, the witness, in consequence of this information described it in the will as above mentioned. The close in question had formed a part of *Atkinson's* farm twenty-four years before, and until they came into the possession

session

session of *Watson*. The learned Judge thought this evidence as to the former will could not be submitted to the jury, and directed them to find for the plaintiff.

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Amos for the plaintiff. The evidence, if admissible, would not have the effect contended for by the defendant. The statute of wills, 32 *H. 8. c. 1.*, and the statute of frauds 29 *Car. 2. c. 3.* require that a will shall be in writing. The judgment of the court in expounding a will must be simply declaratory of what is in such written instrument; and evidence merely explanatory of what the testator has written, is admissible, but not to shew what he intended to have written; in other words the question in expounding a will is not what the testator meant as distinguished from what his words express, but simply what is the meaning of his words? (a) The defendant must rely on the maxim *ambiguitas verborum latens verificatione suppletur*, and it will be said that this is a latent ambiguity, and as it arises from parol evidence, it may be removed by parol evidence. The meaning and extent of this maxim is defined with great care by *Tindal* C. J. in the late case of *Miller v. Travers* (b). This is not within the first class of cases mentioned by him, where the description of the thing devised is clear on the face of the will, but on the death of the testator, it is found that there is more than one estate, or person, whose description follows out and fills the words used in the will, for here the description, taken alone, is inapplicable to two closes. It is now unnecessary to

(a) See Mr. *Wigram's* Observations on the case of *Goblet v. Beechey*.

(b) 8 *Bingh.* 244.

enquire

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enquire whether, under the terms "*the close in the possession of Watson*," parol evidence would be admissible to shew which was intended, because all the parol evidence, if admitted, goes to shew that both were equally intended. Nor does it come within the second class of cases, as a description accurate in part and inaccurate in part, for in order to make out the testator's intention to devise any of the premises in the occupation of *Watson*, the word *close* in the will must be changed from the singular to the plural; an entire new description must be substituted; and that would be calling in extrinsic evidence to introduce into the will an intention to devise a plurality of closes; the intention apparent on the will being to devise a single close. Then, after rejecting a part of the description, there is not sufficient to ascertain the thing devised. The general expression in Lord *Bacon's Maxims*, as to latent ambiguity (*a*), is very much limited by his examples. He says there are two kinds of "*ambiguitas latens*;" first, where one name and appellation doth denominate divers things, and, secondly, where the same thing is called by divers names. In the instance which he gives of the first, namely, "I grant my manor of S., and I have *North S.* and *South S.*," the name S. would include both *North S.* and *South S.*: "the general intent," he says, "includes both the special, and therefore stands with the words." But, here the words "the close" will not apply to either exclusively or to both. In *Altham's* case (*b*), Lord *Coke*, speaking of cases of averment of matter of fact, dehors a fine, says, that such averment is good, which well stands

(*a*) See 4 *Bacon*, 79, 80. Ed. 1803.

(*b*) 8 *Rep.* 155 a. 1.

with the words of the fine." And in *Druce v. Denison* (a), Lord *Eldon* says, "When a man devises to his son *John*, and happens to have two sons of that name, supposing one to be dead, there is a latent ambiguity, letting in parol evidence, but parol evidence perfectly consistent with the description in the instrument," Here the result of the parol evidence is to shew that "*the close*" means two closes of different names, and separated from each other: that is not consistent with the words of the will. If the parol evidence had shewn that only one close was meant, as if the testator was seised of one only, then the result would have stood with the will. It may be said the devisee has an election, and that the will operated as a devise of whichever close the devisee should please. Thus, when a man grants ten acres of wood in a particular parish, where he has a hundred acres: the presumption then is, where the thing is nominated by quantity, that the intention of the grantor was indifferent which ten acres the grantee should take. Or when, after a recital in a deed that he has *North S.* and *South S.*, he leases *unum manerium de S.* *Bac. Max.* 80. Here no such intention of the testator is disclosed.

But, secondly, the parol evidence of what passed in 1825, when the testator made a former will, is inadmissible: the wills in 1825 and 1827 are not facsimiles of each other; they are not drawn by the same person: even in the very clauses relating to property in the possession of *Watson* the language is different. Besides, declarations of the testator not made at the time of the making of the will are inadmissible, *Thomas v. Thomas* (b). The Court will be very cautious in ad-

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(a) 6 Ves. jun. 397.

(b) 6 T. R. 671.

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mitting evidence which is not used to apply the words to the will, but which, setting aside the words, is used to prove an intention which does not stand well with the words in the will. The true question is, whether all the parol evidence, the words of the will do express the intention ascribed to the testator?

N. R. Clarke, contra. The Court will, if possible, give effect to the intention of the testator apparent on the face of the will. First, even without reference to any extrinsic evidence, except that which shews that there were in fact two closes occupied by *Watson* in *Kirton*, the case ought not to be considered as if the devise had been of one of two closes, and it could not be ascertained by the will which of the two it was. The testator meant to give all that which *Watson* occupied. The principal farm was occupied by *Atkinson*, and these two closes were parcel of that farm. The word "close" was used by the testator in the same sense as land, and it was devised as a parcel of *Atkinson's* farm. The word close does not necessarily mean a field enclosed by four hedges, but, in legal signification, has a much larger meaning, and extends to parcel of land, common, or forest. By a devise of all the testator's messuage then in the occupation of *E.*, a coal-cave within the boundary of a messuage in *E.'s* occupation, and always used with it, was held to pass, *Press v. Parker* (a). In *Lane v. Earl Stanhope* (b), leasehold property was held to pass under the words, "manors, messuages, houses, farms, lands, and real estate." Here there is no circumstance to shew that the testator did not mean to pass all the land in *Kirton* occupied

(a) 2 Bingham 456.

(b) 6 T. R. 345.

Watson. This falls within the second class of cases mentioned by *Tindal* C. J. in *Miller v. Travers* (a); because the description is true in part, the land being occupied by *Watson*; but it is not true in every particular: it does not consist of one, but of *two* closes.

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It is objected that evidence of declarations not made at the time of the will was inadmissible, but this evidence was offered to shew what the testator considered to be the land occupied by *Watson*. There are many cases where land, though not under the precise denomination given by the testator, has been held to pass; thus in *Goodtitle v. Southern* (b), by a devise of "all that my farm called *Troques Farm*, now in the occupation of *A. C.*," lands parcel of *Troques Farm* not in the occupation of *A. C.*, were held to pass. [*Parke* J. There the land passed under the first part of the description, and that decision proceeded on the principle, *falsa demonstratio non nocet*.] Here the word *close* has no technical meaning. In *Doe v. Roberts* (c), the testator devised all his messuage or dwelling-house, with the appurtenances, in *High Street*, and all and every his buildings and hereditaments in the same street, to *C. D.* *A.* had only one house in the *High Street*; but behind that house he had two cottages, fronting a back lane. There was no thoroughfare through the lane, the only entrance being from the *High Street*: and it was held that the two cottages passed under the will. [*Parke* J. Unless the cottages in the lane were included in that devise, the words of the will would have been inoperative; and there an enlarged sense was given to the word "*in*." *Denman* C. J. The word was held to include premises not actually situate in the street, but to which the only

(a) 8 *Bingh.* 244.(b) 1 *M. & S.* 299.(c) 5 *B. & A.* 407.

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access was from the street.] It may be a question, all events, whether the devisee is not entitled to one the two closes.

Amos, in reply. In *Goodtitle v. Southern* (a) the description in the will was true in part, and the rest might have been struck out. Here, if you strike out any part of the description, nothing remains. *Lane v. The Earl of Stanhope* (b) turned on the meaning of the word "farm." In *Press v. Parker* (c) the coal-cellar might be considered parcel of the "messuage." A distinction must be drawn between evidence offered to shew what the testator intended, and evidence to shew, from the circumstances of the property, what he understood the terms he employed.

DENMAN C. J. I think there was, in this will, latent ambiguity, which might be explained by parol evidence; but the evidence which has been given leaves it in doubt what the testator meant to pass by the words "*the close* in the occupation of *Watson*." If it had been shewn that there was only one close in his occupation, the supplementary evidence would have made it clear that that close was intended; but here it appears there were two closes in his occupation, and therefore the evidence leaves it doubtful which was meant to pass. As, therefore, it is not ascertained either by the words of the will, or by the evidence given to explain them, what the testator intended, the devise is void for uncertainty, and the heir at law is entitled to recover. This is not a case of election; for an election can take place only where the intention of the devisor

(a) 1 M. & S. 299.

(b) 6 T. R. 345.

(c) 2 Bingh. 456.

grantor is clear, that, out of a mass, a certain portion should be selected. Assuming that the evidence of the former will, and what took place preparatory to it, was admissible, (which is very doubtful), it appears that the testator, on that occasion, gave instructions in writing to his attorney, desiring that all the land in *Kirton* occupied by *Watson* should go to his great nephew; that the testator afterwards gave him verbal instructions, and described the land in the occupation of *Watson* as a close; and that, not being certain what land *Watson* occupied, he made enquiry of one *Neale*, who, in the testator's presence, stated that the land in the occupation of *Watson* was in *one* close; and that, in consequence of that information, the attorney so described it in the will. If *Neale* had said it was in two closes, it is possible the testator might not have left *both* closes. We cannot, from that evidence, say that the testator meant to give either the one or the other close.

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LITTLEDALE J. I am of opinion that the parol evidence does not shew which of the two closes the testator intended to devise; and, consequently, it does not explain the ambiguity of the will. The evidence as to the former will, only shews that the testator intended to devise some close in the occupation of *Watson*. In *Goodtitle v. Southern (a)*, the devise was of "all that my farm, called *Trogues Farm*, now in the occupation of *A.*" There the first part of the description was certain; and it was held that the subsequent defective description of the occupation would not vitiate the previous correct one. The word *close*, in this will, is not synonymous with the word *land*, for

(a) 1 M. & S. 299.

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the word *closes* occurs frequently in it. Independent of that, the word *close* is not so comprehensive a term as *land*. This is not a case of election, because it does not appear, from the context of the will, that the testator intended that the devisee should have an election. In the case put in *Co. Litt.* 145. *a.* where a gift is made of one of the donor's horses in his stable, it is manifest that the donor intends that the donee should select. So in the case put in *Bacon's Maxims*, of the grant of ten acres of wood, in a place where the grantor has 100. Here, then, the devisee having no election, and it being impossible to discover by the words of the will, or by the parol evidence, what was intended to be given, the devise is void for uncertainty. In Lord *Cheyney's* case (*a*), it was resolved, "that if a man has two sons, both baptized by the name of *John*, and, conceiving that the elder (who had been long absent) is dead, devises his land by his will in writing to his son *John* generally; and, in truth, the elder is living; in this case the younger son may, in pleading, or in evidence, allege the devise to him, and if it be denied, he may produce witnesses to prove his father's intent, that he thought the other to be dead. And it is afterwards said, "if no direct proof can be made of his intent, the devise is void for the uncertainty. So in *Doe dem. Hayter v. Joinville* (*b*), where, by the dubious use of the word *family* (*viz.*, brother and sister's family) in a will, the testator having had two sisters, one of whom was dead leaving children, it could not certainly be collected to what person he meant to apply it, the heir at law was held entitled to take. And in *Mohun v. Mohun* (*c*), where the whole will consisted

(a) 5 Rep. 68. b.

(b) 3 East, 172.

(c) 1 Swanst. 201.

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these words, "I leave and bequeath to all my grandchildren, and share and share alike," and by a codicil the testator appointed certain persons to be trustees for all his grand-children and nieces, Sir *Thomas Plumer* held, that the devise was void, "there being uncertainty both in the subject and objects of the bequest." In the present case, therefore, I think that the devise is void, and the heir at law is entitled.

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PARKE J. I am of the same opinion; and I have formed that opinion with some regret, because I am satisfied that the testator intended to do something which he has not done. But I should be much more sorry to break in upon the established rule of law, that the heir at law is entitled to the estate of his ancestor, unless there be a good devise by the latter. Parol evidence was undoubtedly admissible to shew that *Watson* occupied *two* closes in *Kirton*, at a distance from each other. And, generally speaking, evidence might be given to shew that the testator used the word *close* in the sense which it bore in the county where the property was situate, as denoting a farm; but here such evidence was not admissible, because it is manifest that, in this will, the testator used the word *close* in its ordinary sense, as denoting an inclosure; for the word *closes* occurs in other parts of the will. If the parol evidence had been confined to the fact of there being two closes in *Kirton* in *Watson's* occupation, and to their situation, it would not have removed the uncertainty which of the two closes the testator meant to pass; but still the case would have fallen within the first class of those mentioned by *Tindal C. J.* in *Miller v. Travers (a)*, as "where the testator devises

(a) 8 *Bingh.* 248.

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his manor of *Dale*, and at his death it is found that has two manors of that name, *South Dale* and *North Dale*; or where a man devises to his son *John*, and has two sons of that name:" in each of which case parol evidence is admissible, to shew which manor was intended to pass, and which son was intended to take. Such evidence is admissible to shew (as Mr. *Amos* properly pointed out), not what the testator intended, but what he understood to be signified by the words used in the will. Then as to the evidence of what passed at the time of preparing the first will, that does not shew which of the two closes the testator meant to devise. It appears he was mistaken in supposing that he had only *one* close in *Kirton* in *Watson's* possession, but that does not remove the doubt as to which close he intended to devise, and it being, then, impossible to say which of the two closes he intended to give, the devise is void for uncertainty. The devisee clearly had no election here. That exists only where, on the natural construction of the instrument, there is a clear intent in the testator or grantor that there shall be an election in the devisee or grantee, as in the instances put in *Bacon's Maxims*, the reason of which is there given. Here cannot be collected, on the face of the will, that the testator intended that the devisee should have a right to elect; for he devises *the* close (not one of two closes) the occupation of *Watson*. The judgment must, therefore, be for the defendant.

Judgment for the defendant.

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SHAW and Others, Assignees of RICHARD BATLEY, *against* THOMAS BATLEY. Friday,
May 3d.

AT the sittings in *Middlesex* after *Michaelmas* term 1830, this cause, with all matters in difference, was referred to a barrister. The arbitrator made his award, dated 1st of *June* 1832; by which, after deciding upon the cause (as to which no question arose before the Court), he found the following facts: — That *Richard Batley* committed an act of bankruptcy, and became bankrupt on the 29th of *March* 1828; and that a valid commission of bankruptcy was issued against him on the 29th of *July* in the same year, under which the plaintiffs were duly appointed assignees. That on the 26th of *March* 1828, the Earl of *Stradbroke* agreed with *Richard* to sell him certain marked oak-trees on credit, expiring on the 1st of *February* 1829; but *Richard* was to give security if required. That on the 25th of *April* 1828, Earl *Stradbroke* agreed to sell to *Richard* a further quantity of marked trees on credit, but on the terms that no part of the timber (except the bark and top-wood) should be removed until actually paid for or secured to the satisfaction of the Earl. That *Richard* took possession of, and sold, the bark and top, of the value of 2000*l.*; and paid the Earl, on account of the said purchase, money due to the vendor for the timber purchased by the first agreement and in part received, and should be entitled to retain the timber so purchased. The bankrupt then delivered money and bills to the defendant, to be paid to the vendor for the timber first purchased. The defendant paid the cash to his own bankers, and indorsed the bills to them; and afterwards paid the amount of the cash and of the bills to the vendor, by a single draft on those bankers. After this the commission issued.

Held, that the defendant was not liable to repay the cash to the assignees, nor to indemnify the bankrupt's estate against the bills; for the defendant was the mere agent of the vendor, and neither the cash nor the proceeds of the bills could have been recovered back from him, the transaction on his part being a bona fide one, protected by 6 G. 4. c. 16. s. 82.

A bankrupt made a purchase of timber by two agreements, one before and one after the act of bankruptcy, and, after the act of bankruptcy, received part of the timber without paying for it, but was not entitled to receive the remainder without giving security for the whole. After the act of bankruptcy the defendant became security, and purchased from the bankrupt the benefit of the contract; which purchase was recited in the instrument by which the defendant became security. The bankrupt afterwards agreed with the defendant, that he, the bankrupt, would pay the

600*l.* 10 *Aug.* 29*l.*

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600*l.* only; that the Earl thereupon required security for the residue of the purchase-money, and refused to permit any part of the timber to be removed before such security had been given; and that the defendant (*Richard's* father) agreed to become such surety.

That on the 5th of *June* 1828, an agreement in writing was executed between *Richard* and the defendant, in which, after reciting the before-mentioned transactions, and also that the whole of the timber-trees had been felled and remained there (except the bark and top-wood), and that *Richard* had applied to the defendant to become surety for him to the Earl, and, to indemnify him for so doing, had agreed to assign and make over to him all the timber-trees, and the contracts for the purchase thereof; to which the defendant had consented, *Richard* agreed to sell the timber to the defendant, and also the said contracts; and the defendant agreed to buy the timber at 7*l.* per load (the price to be paid to the Earl by *Richard*, after deducting the value of the bark and top-wood), to be paid or allowed by the defendant to *Richard*; and the defendant agreed to accept of bills, to be drawn upon him by *Richard*, for the amount of the sum which should remain due to the said Earl after payment of the sums of 650*l.* and 750*l.*, payable to the Earl or his order, and to give such other guarantee as the said Earl should require.

That on the same 5th of *June* 1828, the defendant, on the requisition of the Earl, executed and delivered to him an instrument, by which he undertook to guarantee to the Earl the payment of all sum and sums of money then due and payable to him from *Richard* for the timber-trees lately sold to him by the Earl, namely, the sums of 650*l.* and 750*l.* upon the said timber be-

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measured up, the sum of 1000*l.* on the 1st day of *December* then next, one moiety of the balance which should then remain due on the 1st of *February* then next, and the residue of the said purchase-money on the 6th of *January* 1830, he “ the said *Thomas Batley* having purchased the said timber, and all benefit of the contracts entered into by the said *Richard Batley* with his Lordship for the purchase thereof.”

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That on the 16th of *June* 1828, it was further agreed between the defendant and *Richard Batley*, that *Richard* should be allowed to have and take all the timber-trees and other trees, first purchased by the said *Richard*, and afterwards purchased by the defendant of the Earl, or of the said *Richard*, and felled from the estates of the Earl, at such price or prices, and on such terms, as the same had been so purchased of the Earl by *Richard* and the defendant, or one of them. That the defendant should retain in his hands certain effects of *Richard* as a security to him, and as a set-off for any sum he might pay or lose in consequence of the engagements above mentioned. That the property in the said timber should still remain and continue in the defendant, until the whole of the purchase-money for the same should be paid to the Earl; and that the said defendant should have the right of stopping the removal of the said timber, or any part thereof, from the estate of the Earl, or other places, and keep the same until such purchase-money should be paid, and should be at liberty himself to sell any part of such timber, in order to raise money for payment of the same. That the defendant should receive all sums payable by certain persons who had purchased a part of the timber from *Richard*; that the defendant's receipt should be a good discharge for the same; and
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that such money should be by him paid or retained in account or in discharge of the purchase-money to the said Earl; and that the sum of 1400*l.*, which the defendant was to receive on the 23d of *June* then instant, should be paid by the said *Richard Batley*.

The arbitrator further found, that it was so agreed that *Richard* should pay the sum of 1400*l.* (being the amount of the said sums of 650*l.* and 750*l.*) on the 16th of *June*, because he had already received and sold the bark and tops of the said trees to the value of 2000*l.* upwards, and had only paid the Earl 600*l.*; that the said *Richard*, between the said 16th of *June* 1828, and the 21st of *July* in the same year, delivered to the defendant 400*l.* in cash, as being his own proper money, and two bills of exchange for 500*l.* each, as his property, drawn by the said *Richard* on one *Smith*, not then due, for the purpose of the defendant paying the said sum of 1400*l.* to the said Earl; and that the defendant paid the said 400*l.* to his own bankers, and endorsed the said bills of exchange to the same bankers as his own property. That the defendant, on the 21st of *July* 1828, paid the said sum of 1400*l.* to the said Earl, by a draft on his said bankers, which was duly paid; and the said two bills not having been paid, the same had been proved against the estate of the bankrupt; and that the defendant, besides the said sum of 1400*l.*, had also paid other sums to the said Earl in account of the said timber, which, with the 600*l.* paid by *Richard Batley*, and the said 1400*l.*, amounted to 10,986*l.* 3*s.* 3*d.*, the full price of the said timber, bark and tops.

That the plaintiffs, as such assignees, had, upon the matter so proved before the arbitrator, claimed the

400l.; and required also that the bankrupt's estate should be indemnified against the said proof of the two bills of exchange, and all dividends in respect thereof.

The arbitrator then awarded, that the claims of the assignees were not sustainable, but that if this Court were of a different opinion, the defendant should pay the 400l. to the assignees, and should pay to the plaintiffs the amount of any dividends which they had been, or should be, obliged to pay in respect of the proof of the bills of exchange, and that he should indemnify them in respect of those bills, and relinquish and assign to them all benefit to be derived in respect of them from the drawer.

In *Trinity* term 1832, the plaintiffs obtained a rule calling on the defendant to shew cause why he should not make the payments and give the indemnity, according to the terms of the award; and why the plaintiffs should not be at liberty to enter up judgment for the sums payable. In the following term the Court ordered the case to be set down in the special paper for argument on the question raised by the award.

Sir *James Scarlett* for the plaintiffs. The defendant has, since the bankruptcy of *Richard Batley*, received from him 400l. in cash, and two bills of 500l. This makes the defendant liable *primâ facie*, and the plaintiffs must recover, unless the case fall within a class of decisions to which the arbitrator has probably referred it. These decisions, whether correctly or not, establish that the assignees of a bankrupt cannot recover money from the agent of a third party, where such agent has merely delivered it in that character to a bankrupt, *Coles v. Wright* (a);

(a) 4 *Taunt.* 198.

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and that money paid by a mere agent of the bank to a third party cannot be recovered from such agent the assignees, *Tope v. Hockin* (a). But the defendant is not a mere agent. He guarantees the debt of *Richard Batley*, and he expressly declares that he has himself become the purchaser of the timber. He therefore becomes Lord *Stradbroke's* debtor; and accordingly, in his agreement with Lord *Stradbroke*, he recites the agreement of 5th June 1828, made between himself and *Richard*, by which the defendant had become the purchaser of the timber and of all benefit of the contract made between Lord *Stradbroke* and *Richard*. *Richard* had, indeed, received timber to the value of 1400*l.* beyond the sums which he had paid; so that the defendant could not have the benefit of the contract until *Richard* should pay the 1400*l.* He therefore contracts with *Richard* that the latter shall pay that sum; but as between Lord *Stradbroke* and the defendant, the defendant is bound to pay Lord *Stradbroke* the 1400*l.* in all events. As between *Richard* and the defendant, *Richard* was bound to furnish the defendant with the money, and he did so furnish him; but the defendant did not receive it as agent to Lord *Stradbroke*. The defendant places the cash with his own banker, and treats the bills of exchange as his own property, without *Stradbroke* ever indorsing them at all; and he afterwards pays Lord *Stradbroke* by his own draft. In the cases referred to, the party making the payment had no personal liability or right; but here Lord *Stradbroke* was entitled to sue the defendant, and the defendant could sue *Richard*. Each of the three parties stood on

(a) 7 B. & C. 101.

own contract. It follows that *Richard* paid the defendant for his own use, not as Lord *Stradbroke*'s agent. Had this money been paid to the defendant even before the act of bankruptcy, in contemplation of bankruptcy, a jury would have found that the payment was an act of bankruptcy and a preference of the defendant. They never would have considered Lord *Stradbroke* liable. Here the case goes farther, for there is an antecedent bankruptcy. There might perhaps have been some pretext for the defence, if the defendant had paid over to Lord *Stradbroke* the identical money received from *Richard*. But, instead of doing so, he has taken a further credit between himself and Lord *Stradbroke*, which shews that he was in fact paying his own debt. Now, if a party guarantee the debt of another, and that other become bankrupt, and afterwards pay money to the warrantor to indemnify him, leaving the warrantor to pay the money over to the original creditor, the warrantor is clearly liable to refund to the assignees. In the present case the assignees might have brought trover for the bills; and it would have been no defence to say that the bills had been discounted, and the proceeds paid over. *Coles v. Wright (a)* is distinguishable. There the defendant had delivered to the bankrupt money raised by the sale at auction of goods belonging to the bankrupt, which sale took place after the committal of the bankrupt to prison. The defendant had merely carried the money from the auctioneer to the bankrupt. Sir *James Mansfield*, in his judgment, says, that the action might have been maintained against the auctioneer, but that it would be hard to apply the

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doctrine of relation to a mere agent for delivering money. Where, then, a party is excused on the ground of his being a mere holder, the liability arising from an improper payment or receipt falls upon the person from whom the money comes, or to whom it ultimately goes. But here, if the assignees sued Lord *Stradbroke* he would defend himself by shewing that he received the money, not from *Richard*, but from the defendant; the relation of the parties to each other is therefore different in all respects from that in *Coles v. Wright*.

F. Pollock for the defendant. The assignees cannot recover, unless they have an equitable as well as a legal title. The Court will look at the substance of the transaction rather than the form. The defendant has interfered to protect the credit of *Richard Batley*, his partner, and the agreement substantially amounts to this : — *Richard* having made the purchase, the defendant took the property and gives a guarantee; the property is to be the defendant's, but *Richard* is to indemnify him, inasmuch as *Richard* had received 2000*l.* and paid 1400*l.*, and the remaining 600*l.* was to be paid on a given day to Lord *Stradbroke*, the defendant stipulated that *Richard* shall pay that 1400*l.* Therefore the money paid by *Richard* is not paid to the defendant, but to the original creditor, Lord *Stradbroke*. And this construction of the contract agrees with the finding of the arbitrator, who states expressly that the 1400*l.* delivered by *Richard* to the defendant, for the purpose of the defendant paying it to Lord *Stradbroke*. No particular form is required to protect such a transaction; it cannot be said that the defendant should have required *Richard* to make the payment in person; so

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preciseness is rather a badge of fraud. Little stress can be laid on the circumstance that the defendant did not pay over to Lord *Stradbroke* the identical sum delivered to him by *Richard*. Payments are seldom so made, and in the present case the bills required discounting before the payment could be made at all; and no reason can be assigned against the defendant's giving his own indorsement to the bankers for the purpose of procuring the discount. The doctrine in *Coles v. Wright (a)*, which was laid down with the view of relaxing a hard rule of law, is not to be narrowed by laying an undue stress on such points. The present case would have been different if the arbitrator had found that the object of the payment was to secure the defendant himself. [*Denman C. J.* It certainly is a circumstance in your favour that the arbitrator uses the term "delivered," not "paid."] And no doubt Lord *Stradbroke* might have sued the defendant for money had and received to his use.

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Cur. adv. vult.

DENMAN C. J. during the term, delivered the judgment of the Court.

The 400*l.* in cash, and the two bills of 500*l.* each on *Smith*, are found by the arbitrator to have been delivered to *Thomas Batley* for the purpose of his paying 1400*l.* to Lord *Stradbroke*. As this 1400*l.* was due to his lordship in cash, it cannot be understood to be the finding of the arbitrator that the specific bills of exchange should be delivered to Lord *Stradbroke*, for those bills were not then due; it must be intended that *Thomas Batley* was

(a) 4 *Taunt.* 198.

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in some way to convert them into cash, and to pay a sum of 1400*l.* with that cash and the 400*l.* paid to Lord

If this be so, *Thomas Batley* must be taken to have acted as the agent of the bankrupt in converting the bills into present cash, and paying the proceeds together with the 400*l.*, to Lord *Stradbroke*. Upon this supposition, the payment is protected under the eighth and second section of the 6 G. 4. c. 16. (a) But for the provisions of this statute and the 19 G. 2. c. 32. the assignees could certainly have recovered back the sums from Lord *Stradbroke*, though the specific sums received from the bankrupt was not paid into his hands (as to the last point, *Allanson v. Atkinson* (b) is an authority), but the clause in the existing bankrupt act, not that in 19 G. 2., clearly protects this payment, and prevents them from recovering it. If the assignees cannot recover from Lord *Stradbroke*, and the payment to him be good, it cannot be permitted that they should recover from the agent, who merely acts as agent in making a valid disposition of the bankrupt's property.

(a) Which enacts, "That all payments really and bonâ fide made by any bankrupt, or by any person on behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and bonâ fide made, or which shall hereafter be made, to any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed."

(b) 1 M. & S. 583.

For these reasons we are of opinion that the award is right, and the defendant's rule must be discharged.

Rule discharged.

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In the Matter of BONNER, Gent., One, &c.

A RULE had been obtained, calling on Mr. *Bonner*, an attorney of this Court, to shew cause why he should not pay over certain sums of money to *Matthew Robinson* and *Samuel Campain*, executors of *William Stokes* deceased, with the costs of that application. It was stated on affidavit in support of the rule, that the testator, *Stokes*, had agreed to purchase a farm of one *Decamps*, who employed *Bonner* as his attorney. *Bonner* drew the agreement for the purchase, and the vendor and vendee paid him each a moiety of the charges. Part of the purchase money had been paid at that time; and on a communication from *Bonner* that the conveyance was prepared and the rest of the purchase money wanted, *Stokes*, on the 10th of *April* 1828, paid the money to *Bonner's* clerk, who gave a receipt, and said the title deeds should be sent. They, however, were not sent, though often called for by *Stokes*, and *Bonner* afterwards became bankrupt. It then appeared that *Decamps* had not received the purchase money; and *Stokes*, who had been let into possession, was turned out, incurred 50*l.* costs in litigation, and, in order to regain possession of the property, was obliged to pay

Where an attorney has received money to the use of his client, and not accounted for it, and has afterwards become bankrupt and obtained his certificate, the Court will not, on motion, order him to repay the money so received, the amount being a debt barred by the certificate.

But if the attorney committed fraud in the receiving and not accounting, the Court, in the exercise of its general jurisdiction over its officer, will enforce such payment, as a modification of the punishment which it might otherwise inflict for his misconduct.

The case of fraud, however, ought to be clear, and the attorney should have notice by the form of the rule, that the application is of a penal nature. It is not enough to call upon him to shew cause why he should not pay over the money.

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the residue of the purchase money a second time. died in 1831. The executors, in making this application, charged *Bonner* with having fraudulently obtained the money so paid to his clerk.

In answer to this affidavit, Mr. *Bonner* swore that the delay in completing the conveyance had arisen from the premises being under mortgage, which *Decamps*, the vendor, had been unable to pay off. That before the conveyance had been effected, *Stokes* paid the residue of the purchase money to *Bonner's* clerk, but without any solicitation by, or notice to, *Bonner* himself. That in consequence of losses on a property in *Wales*, in which he had embarked a large sum of money, *Bonner* afterwards became bankrupt; a commission issued, and he subsequently obtained his certificate. That the amount now claimed as the residue of purchase money paid to *Bonner's* clerk was a debt proveable under the commission. That the litigation in which *Stokes* incurred the costs above mentioned, was a suit brought by the mortgagee to recover possession, and that *Bonner* was not answerable for such costs. That *Stokes* had never in his life instituted any proceeding like the present against *Bonner*, nor charged him with fraud, and that, in fact, he had not been guilty of any fraud.

The *Solicitor-General*, and *Jeffery Williams* showed that the cause (*a*). This was a sum of money voluntarily paid by a purchaser to an attorney who acted both for him and for the vendor, and constituting a debt which might have been proved under the commission, if the money had not been paid over. The certificate, therefore, is an answer to this application: *Ex parte Cull*.

(*a*) May 2d.

v. *Wan*

v. *Warren* (a). It would have been a ground of discharge from an attachment: *Rex v. Edwards* (b). It is not even clear that, when this money was paid to *Bonner*, the vendor did not become entitled to it as money paid to his use, and that he may not actually have taken steps to recover it. The decision of this Court, *In the matter of Bonner*, in *Hilary* term 1832 (c), when the rule was made absolute, was not well considered, nor is it applicable to this case. [*Parke J.* The decision there must have proceeded on the ground of improper conduct in an officer of the Court; and it cannot be contended, that the Court may not punish an attorney for misconduct committed before he obtained his certificate, by making him pay over sums of money, for which he was then liable, instead of inflicting the severer penalty of striking him off the roll.] This is not, in point of form, an application against an attorney for misconduct; and if it were, no case of fraud is established.

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Humfrey contra. If the Court decided rightly on the former motion against this party, the present application cannot be refused. There the transaction, out of which the claim against him arose, was of still older date, and the certificate was relied on: but Lord *Tenterden* said, "Let the attorney dare to tell the Court that, having obtained this money in his professional character, he will not pay it over because he is protected by his cer-

(a) 8 B. & C. 220.

(b) 9 B. & C. 652.

(c) This was an application, calling upon the same party to repay sums of money under circumstances very similar to the present, but the case of fraud was more strongly and circumstantially stated. There were contradictory affidavits, but the Court, on the last day of *Hilary* term, made the rule absolute.

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tificate, and I shall know how to deal with him." Admitting that the certificate was a bar to this claim, the Court might compel the attorney to pay the money as a means of escaping heavier punishment: as a party, who is brought up for judgment, is sometimes compelled in the same manner to pay the prosecutor's costs, though the Court has no power of enforcing such payment directly. And the conduct sworn to in the present case would clearly be punishable by the Court as a fraud in one of its officers. In the first two cases mentioned on the other side there had been a debt distinctly proveable under the commission; here, the vendee paid the money as to the vendor's attorney, and never heard, till a long time afterwards, that the vendor had not received it: it would have been difficult to say, under the circumstances, at what period a debt accrued as between *Bonner* and the vendor.

LITLEDALE J. I think the Court cannot interfere. Looking at this as the case of a person not an attorney of the Court, there can be no doubt that the demand in question was a debt which would have been proveable under the commission. It is clearly barred by the certificate. If the party, in his character of an attorney, has been guilty of fraud, an application may be made to punish him for that fraud. The former case, *In the matter of Bonner*, does not seem to have been liberately considered by the Court.

PARKE J. I am not disposed to dissent from the general proposition which appears to have been established upon in the former case, that although an attorney may have obtained his certificate as a bankrupt, this Court may exercise the general jurisdiction which it has over its officers.

officers, to oblige him to do justice. But to warrant this, there should be a clear case of fraud. In the present instance, I think the Court ought not to interfere.

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DENMAN C. J. This case is so like in its circumstances to the former case *In the matter of Bonner*, in which I was counsel, and the Court decided against me, that I am unwilling to give an opinion. I think, however, that the Court should have the power over its officers which has been ascribed to it; but if a punishment is to be inflicted on the attorney, which punishment is to be modified so as to make him pay over a sum of money that is demanded of him, he ought to have notice of what is intended, by a motion in a different form from the present (a). The rule will, therefore, be discharged.

Rule discharged.

(a) In the former case, *In re Bonner*, the rule, granted on the affidavit of M. P. was, that *Bonner* should shew cause why he should not pay over the sums of money specified, and the costs of that application; and that he should answer the matters of the said affidavit.

JOSEPH ARDEN and RICHARD EDWARD ARDEN,
Gents., &c. against TUCKER, Gent., One, &c.

Monday,
May 6th.

ASSUMPSIT for work and labour of the plaintiffs as attornies, in prosecuting, defending, and soliciting divers causes, suits, and businesses for the defend-

Where a party has employed two attornies, partners, to manage a cause for him in the Palace Court,

an action in the common form lies against him at the suit of both, for the bill of costs, though one only was an attorney of the Court, and actually did the business there.

Although the client gave a written retainer to the latter attorney only, and he only was mentioned in the rule for taxing costs, these facts were held not conclusive, there being evidence, aliunde, of a contract with both.

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2 Bacc. 570.

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ant, and for fees due in respect thereof, and for journey Money counts, &c. Plea, non-assumpsit. The particular of demand was, "Amount of plaintiffs' bill business done by them for defendant in the Palace Court, in a cause, *Tucker, Gent., v. Stevens, 25l.*" The trial before Lord Tenterden C.J., at the London sittings after Trinity term 1832 (a), it appeared that business was done upon the defendant's retainer, in this cause in the Palace Court. The plaintiffs were partners, but *Joseph Arden* only was an attorney of the Palace Court, and his name only was mentioned in the defendant's written retainer. The bill was signed by both, but in the order of the Palace Court for taxation it was mentioned as the bill delivered by *Mr. Arden*. The defendant had written letters to both plaintiffs jointly on the subject of the cause and its charges, while it was depending; and after it was over he proposed to pay them 15*l.* in discharge of their costs, instead of 20*l.* which they had demanded. For the defendant it was objected that the plaintiffs, not being both attorneys of the Palace Court, could not join in an action for business done there, to which point *Brandon and Brindley v. Hubbard* (b) was cited; and further, on the authority of *Collins v. Godefroy* (c), that the promise to pay, under such circumstances, was not binding. Lord Tenterden was of opinion that the plaintiffs could not recover, and directed a nonsuit, giving leave to the plaintiffs to move to enter a verdict for them. A rule nisi having been obtained for this purpose,

(a) See 1 *Moody & Robinson*, 191., where the case is reported as present and another point.

(b) 2 *B. & B.* 11.

(c) 1 *B. & Ad.* 950.

The Solicitor-General and *Kelly* in the present term shewed cause (a), and again relied on the above-mentioned cases. The retainer was an express contract with *Joseph Arden* singly. If he had misconducted himself in the cause, *Tucker* could not have brought an action against both partners. The client could only contract with the partner who could legally act upon the retainer; there was no consideration for an undertaking to the partner who, by the rules of the Palace Court, could not practise there. [*Parke J.* Is there such a restriction?] There is a roll of attornies in that court, limited to six. The rule of court was, to tax the bill "delivered by Mr. *Arden*." [*Parke J.* It was the bill of both.] De facto, but not de jure. *Heming v. Wilton*, decided about two years ago in the Court of Exchequer, is the converse of the present case. There an attorney sued for business done by him as clerk in court in the Exchequer; the defence was, that he had a partner who ought to have joined in the action; and the defendant, to establish a joint contract with the two, proved that he had given instructions to both, and that their bill was delivered in the name of both. In answer, the plaintiff proved that he alone was entitled to practise in the Court of Exchequer: and the action was held to be well brought. [*Parke J.* Suppose in the present case neither partner had been an attorney of the Palace Court, but they had contracted with the plaintiff to get his business done there. Or suppose the case of an attorney employed to get business done in a Spiritual Court; which often happens.] No doubt there would be a right to recover, but the declaration must be framed

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(a) Before *Denman C. J.*, *Littledale*, and *Parke Js.*

according

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according to the circumstances. Here the claim in declaration is for *prosecuting, defending, and soliciting causes*, and the particular of demand is, for business done in the Palace Court. As for the promise made after the business was done, that could only be *prima facie* evidence of a previous contract with the two plaintiffs; and the rest of the case rebuts it.

Sir James Scarlett contra. *Brandon and Brown v. Hubbard* and another (a) bears no analogy to this case. There the business (preparing a replevin bond) was done by one plaintiff, who was replevin clerk to the sheriff: the other, who was his partner, could not legally act in it. The defendants dealt with *Brandon* in his capacity of replevin clerk, and not as the partner *Brown*. The point as to a joint retainer did not arise there. In *Elkins v. Harding* (b), it was held that an officer of the Court of Exchequer might sue jointly with an unprivileged person, his partner, for agency business done in that court by both: and instances of such proceedings are collected in *Manning's Exchequer Practice* there referred to. The point now taken by the defendant might have been raised in that case, but was not. It is not suggested here that the plaintiffs, in their practice, contemplated any fraud upon the state respecting attornies. It very commonly happens that attornies of this Court have a partner who is admitted in one of the other courts, and conducts the business there. As for the warrant to prosecute, that is always made to a single attorney. But where there are partners, if money is advanced, it comes out of a common

(a) 2 B. & B. 11.

(b) 1 Tyrwhitt, 274. 1 Cro. & J. 54.

fund, and if labour is bestowed, the remuneration belongs to that fund.

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Cur. adv. vult.

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DENMAN C. J. now delivered the judgment of the Court. This case was argued before us on *Wednesday* last. The plaintiffs were in partnership together as attornies; one of them only was an attorney in the Palace Court, and the action was brought by both, for business done in that court. There was sufficient evidence of a contract by the defendant with *both* the plaintiffs that they should do the business for him. But it was contended, first, that this evidence was clearly rebutted by proof of a written retainer of one of the plaintiffs alone, who was the attorney in the Palace Court, and the order to tax, and undertaking to pay his bill, which shewed a contract with that plaintiff alone; and, secondly, that if not, the contract with the plaintiffs was not binding in point of law.

As to the first objection, when it is recollected that the retainer filed in the Court is an authority *quoad* the proceedings in that court only, and is analogous to the warrant of attorney filed of record in this Court; and that the undertaking which is to be enforced in the Palace Court must necessarily be to the attorney in that Court; the evidence of a joint contract with both plaintiffs is very little affected by this species of proof. And on the whole, the weight of evidence is clearly in favour of the joint employment of both plaintiffs.

The second objection is, that such a joint contract is void in law, on the ground that the attorney in the Palace Court could alone sue for business done in that court.

There

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There is no act of parliament which regulates proceedings in this Court (a), and therefore the must be considered as one at common law.

No authorities were cited in support of the position except that of *Brandon* and *Brown v. Hubbard* (b), and the case of *Heming v. Wilton* in the Exchequer. The former case has no bearing upon this, and in that there was a *joint* employment of the plaintiffs. The latter is, as far as we can learn, not reported. It is not in any of the published reports of the Court of Exchequer; and the decision that the clerk in court in the Exchequer might sue alone for business done in that Court, though the partner had delivered a bill as for business done by them, may have proceeded on the ground that the *joint* contract with both partners was not clearly set out.

In the absence of any enactment or decision to the contrary, which we must take to be the case, the question is, whether, upon any principle of law, there is any objection to this action at the suit of both, where the contract is with both, and we think there is no objection.

Suppose neither of the plaintiffs had been attorneys of that Court, but that the defendant had employed them, and they had undertaken with him to do business there for him, and for reward to be paid to them; and they had then employed an attorney of that Court on their own credit, there could have been no objection to the action by both for the reward; it would be like the case of attornies, who, upon their own credit

(a) See as to this court, 2 *Bac. Abr.* 510. in marg. 7th ed. and authorities there cited.

(b) 2 *Brod. & B.* 11.

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employed a proctor in the Spiritual Courts, or, before the recent alterations (*a*), a clerk in court in the Exchequer, and who certainly might have sued their own client for their bill. If so, it can make no difference, that one of the plaintiffs is the person who himself transacts the business in the particular court, where the contract is clearly with both.

We are of opinion, therefore, that this action will lie; and the rule must be absolute to enter a verdict for the plaintiffs.

Rule absolute.

(*a*) 11 G. 4. & 1 W. 4. c. 70. s. 10.

DIGBY *against* THOMPSON and Another.

CASE. The declaration stated, that the plaintiff was a person of good reputation, and had not ever been guilty, or, until the committing of the several grievances by the defendants as thereafter mentioned, been suspected to have been guilty of the misconduct therein after mentioned to have been imputed to him, or of any other misconduct; yet the defendants, well knowing the premises, but contriving, &c. to injure the plaintiff in his said reputation and to bring him into public scandal and disgrace, and to cause it to be suspected and believed that the plaintiff had been guilty of unfair play at cards, and of defrauding persons of their money by means thereof, and by bettings, and that he had played

the Marquis. I do dislike this legal profession," will support a declaration for libel without explanatory averments; for they tend generally to disgrace the plaintiff.

Quære, Whether defendant by demurring to a declaration for a libel, stated to have been published with intent to cause certain matters to be believed, admits particular words in the libel to have been published with that intent.

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The following words, "D. has had a tolerable run of luck. He keeps a well-spread side-board, but I always consider myself in a family hotel when my legs are under his table, for the bill is sure to come in sooner or later, though I rarely dabble in the mysteries of écarté or any other game. The fellow is as deep as Crockford, and as knowing as

unfairly . 5 Bac. 199.

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unfairly and fraudulently at a certain game with cards called *ecarté*, and at certain other games with cards and had thereby won large sums of money from divers persons visiting the house of the plaintiff at *Brighton* in the county of *Sussex*, and that the plaintiff invited persons to his house and entertained them there for the purpose of winning their money unfairly by gaming there; and that the plaintiff was a person of disreputable and bad character, and did in a great measure support and maintain himself by gaming and by unfair and fraudulent practices in gaming and betting, to wit, on, at, &c. wrongfully, maliciously and injuriously published in a certain newspaper called the *Satirist* or *Censor of the Times*, a certain false, scandalous, malicious and defamatory libel of and concerning the plaintiff, containing the false, scandalous, malicious, defamatory, libellous matter following of and concerning the plaintiff; that is to say, "King *Digby*, (meaning the plaintiff as my friend *Tom* used to style him, has had a tolerable run of luck this season, (meaning thereby that the plaintiff had won divers large sums of money by gaming.) He (meaning the said plaintiff) is still here (meaning at *Brighton* aforesaid,) and keeps, I assure you, friend *Sat*, a well spread sideboard; but, curse the fellow! I always consider myself in a family hotel where my legs are singing duets under his table; for the bill is sure to come in sooner or later, although, as you know, I rarely dabble in the mysteries of *ecarté* or any other game. The fellow (meaning the plaintiff) is as deep as *Crockford*, and as knowing as the Marquis. I do not like this leg-al profession." Demurrer, assigning as cause that the matter alleged did not amount to a libel on the plaintiff, and also that although the plaintiff

had by an innuendo alleged that by the words of the libel, “ King *Digby* (meaning the plaintiff), as my friend *Tom* used to style him, has had a tolerable run of luck this season,” the defendants meant that the plaintiff had won money by gaming, and had alleged as an inducement that the plaintiff was guilty of gaming; nevertheless, it was not alleged or shewn that the libel was published of and concerning such gaming, or that such libel had any reference to the matters stated in the introductory part of the declaration, or any of them; and also for that the meaning and explanation by the plaintiff given to the words in the said libel, adds to, enlarges, and changes the sense of those words, and also for that the said meaning and explanation is not connected in any way by averment or otherwise with, or in any way applicable to the matters of inducement before stated, and also for that there is no averment that the defendant was used to employ, or did on the occasion of the publishing, employ the said words in the sense and meaning put upon them by the plaintiff in the said innuendo. No counsel appearing in support of the demurrer, the Court called upon

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Wightman to support the declaration. The defendants have, by the demurrer, admitted that the words of the libel were used with the intention imputed in the declaration; the only question, therefore, is, whether the words set out will bear a sense corresponding with that intention. If the defendants had pleaded, the whole would have been a question for the jury; but after demurrer, if the words can possibly bear the sense ascribed to them, it must be taken that they were used in that sense, and the words “ that the plaintiff had had a tolerable

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tolerable run of luck, &c.," certainly may mean stated in the innuendo) that he had won large sums of money by gaming. Besides, this declaration may be supported, because the matter charged as libellous independently of any innuendo, has a tendency to disgrace the plaintiff, and the Court will understand words used without any explanatory averment, if the sense is sufficiently obvious, as it is here. In *Pearce v. Jones*(a), the plaintiff declared that he was an attorney barrister of the *Middle Temple*, and a practiser of common law for several years, and that the defendant of purpose to defame him, maliciously said of him *J. S.*, his father-in-law, Did Mr. *Pearce*, (the plaintiff) marry your daughter? to which *J. S.* said, Yes; to which the defendant replied, *He is a dunce, and will get nothing by the law*; to which *J. S.* answered, *Other men have a better opinion of him*; to which the defendant replied, *He was never accounted otherwise in the House*. It was held, on motion in arrest of judgment, that the action lay upon this declaration; for a man may be heavy, and not so pregnant as others are, and yet a good lawyer. But here it appeared on the whole matter that it was spoken maliciously, and he said, *He would not get any thing by the law, which disgraced him in his profession*. The Court there took notice of the meaning of the word *dunce*, according to the common understanding (b). And in *Goddart v. Haselfoot* (c) it is held, if a man says of a doctor of physic, "he is an empiric, and a mountebank," an action lies, without an averment of the signification of the words; for these are terms of disgrace well known, and in disgrace of

(a) *Roll. Abr. Action on the Case*, 55. pl. 16.(b) *Cro. Car.* 382. *S. C.*(c) *Roll. Abr.* 54. pl. 12.

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profession. In *Pearce's* case (a) it is said to have been held that, if a man says of a counsellor of the law in the North, "Thou art a daffadowndilly," an action lies, with an averment that the words signify he is an ambodexter. The word "ambodexter," there, might have been said to require an explanatory averment, almost as much as the word it was intended to explain. Here the imputation that the plaintiff invited persons to his house, and entertained them there with a view of winning their money by gaming, has a tendency to disgrace the plaintiff, and no explanation was necessary.

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 against
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DENMAN C. J. I am very unwilling to decide this case on the ground that the defendant has, by demurring, admitted, on the record, that the libellous matter was published with the intent charged in the declaration; and that, if the words can, by possibility, bear the sense alleged, the Court are bound to hold that they were so used. But I think the declaration sufficient, on the more general ground that the matter charged as libellous imports something disgraceful to the plaintiff. The charge is, that the plaintiff invited persons to his house, and entertained them, and made them pay for such entertainment; and that, connected with the other words, may, I think, support the allegation, that the libel accused the plaintiff of making them pay by winning their money in gaming. I give this opinion, however, with reluctance, as I had rather the words had been distinctly explained by inuendoes, than that a jury, if the case had been tried, should have had to speculate on their meaning.

(a) *Roll. Abr.* 55. pl. 15. See *Vin. Abr. Action for Word*, S. a. 10, 11, 12. 16, 17.

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LITTLEDALE J. I think the declaration may be reported, because the libel imputes what is disgraced the plaintiff. I am not prepared to say that we import into this record the admission relied upon Mr. *Wightman*, to give the words complained of sense ascribed to them in the declaration.

PARKE J. Rejecting all the innuendoes, I think the matter charged in the declaration is clearly actionable. No man of common sense could read it without see that it imputed fraudulent and dishonest conduct to the plaintiff. Without, therefore, adverting to the remarks made in argument, that the words here must be taken to have been used with the intent imputed in the declaration, I think the plaintiff is entitled to judgment for the plaintiff.

BIRD, Clerk, *against* JOSEPH RELPH, and his Wife, Executrix of SMITH, Clerk.

21812 - 777 Neglect to cultivate the glebe land in a husbandlike manner, is not a dilapidation for which an incumbent can recover.

Saund Pl. v. 506.

CASE for dilapidations. The first and second counts stated the parsonage house, &c. to be out of repair. The third count stated, that by the law and custom of *England*, the vicars of this kingdom at the time being ought not to manage, use, or cultivate the lands of and belonging to their respective vicarages, nor ought they to suffer or permit the same to be managed, used, or cultivated otherwise than in good and husbandlike manner, and according to the custom of the country where the said lands are situated, and such vicars ought to leave the said lands managed

used, and cultivated in a good and husbandlike manner, and according to the custom of the country where the said lands are situate, to their successors; and that if such vicars do leave such lands to their successors impoverished, damaged, or lessened in value by reason of having been managed, used, and cultivated in a bad and unhusbandlike manner, and not according to the custom of the country where the said lands are situate, then the executors or administrators of the goods and chattels of such vicars, after their deaths, having sufficient of the goods and chattels of such vicars, are bound and ought to satisfy so much as shall be necessary to be expended or paid for repairing the damage done to the said lands by reason of their being so impoverished, damaged, or lessened in value by such improper management, usage, and cultivation. It then stated that *W. Smith* deceased in his lifetime was vicar of *Ainstable*, in the county of *Cumberland*, and was seised, in right of the vicarage, of certain lands in that county, and died; that the plaintiff after his death, to wit, on, &c. was presented, admitted, instituted, and inducted into the said vicarage, and thereby became vicar of the parish church of *Ainstable*, and the next successor of the said *W. Smith*; that at the time of his death the lands were and still are greatly damaged and lessened in value by reason of the same having been used, managed, and cultivated during the lifetime of the said *W. Smith*, and whilst he was such vicar, in a bad and unhusbandlike manner, and contrary to the custom of the country where they were situate, and having been wrongfully left so impoverished, damaged, and lessened in value by the said *W. Smith*, at the time of his death, &c. At the trial before *Gurney B.*, at the *Carlisle* Spring assizes

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1833, it appeared that the lands belonging to the vicarage consisted of ancient glebe land, and of lands allotted in lieu of tithes, under an inclosure act passed in 1820. The learned Judge refused to receive evidence that the allotments under the inclosure had been impoverished by bad husbandry, but gave leave to the plaintiff to move to enter a verdict, if the Judge thought the evidence admissible, for such an amount should be certified by an arbitrator.

Coltman now moved accordingly. The action for dilapidations is founded on the common law, by which the incumbent of a living is required to leave the premises belonging to it in the same state he found them, or to keep them in, so that his successor may have the same beneficial enjoyment of them which he had. It is well known that such actions are usually brought in respect of buildings not being in that state of repair which the incumbent ought to have kept them in, and there is no express authority for saying, that such an action is maintainable against the executors of a deceased incumbent for not cultivating the lands in a husbandlike manner. But the principle on which the action is founded is, that the incumbent for the time being should have the same beneficial use of the property belonging to the living as he who extends to the glebe lands as well as to the buildings. For, it is quite clear, that the successor will not have that beneficial enjoyment of the glebe lands which the incumbent ought to have, if his predecessor has not cultivated them in a husbandlike manner. In *Liford's* case it is said, "If a parson of a church, and one *A*

tenants in common of a wood, and *A.* endeavours to commit waste, the parson, for the preservation of the timber trees, shall have a prohibition against him that he shall not commit waste; and the reason thereof, as the Chief Justice said, was, that if the parson of a church will waste the inheritance of his church to his private use in felling trees, the patron may have a prohibition against him; for the parson is seised as in the right of his church, and his glebe is the dower of his church, for of it he was endowed." And in *Wise v. Metcalf*(*a*), where the question was, by what rule the dilapidations as to the rectory-house, buildings, and chancel were to be estimated, three rules were proposed for the consideration of the Court, the second rule being, that they were to be left as an outgoing lay tenant ought to leave his buildings, where he is under covenant to leave them in good and sufficient repair, order, and condition. *Bayley J.* said, that although the Court were not prepared to say that any of those rules was precisely correct, the second approached most nearly to that which they considered as the proper one. In 2 *Gibson's Codex*, 752., in a note upon the 13 *Eliz. c. 10. s. 1.*, it is said, "Although, in this preamble, nothing is referred to as dilapidation, but decayed or ruined buildings, yet it is certain that, under that name, are comprehended hedges, fences, &c. in the like condition; and it hath been particularly adjudged concerning wood and timber, that the felling of them by any incumbent, (otherwise than for repairs or for fuel) is dilapidation, from which he may be restrained by prohibition during his incumbency; and for which he or

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(*a*) 10 *B. & C.* 299.

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his executors are liable to be prosecuted, after he ceases to be incumbent."

DENMAN C. J. This is an entirely new application. To render the executors of an incumbent liable to an action for dilapidations, there ought to be something like demolition. There is no ground for saying that the executors are liable to such an action for mismanagement of the glebe land.

LITTLEDALE J. concurred.

PARKE J. An action lies by a landlord against a tenant for the mismanagement of his farm, on the implied contract between landlord and tenant that the latter shall cultivate the land in a husbandlike manner. Here no such contract can be implied between a parson and his successor; and there is no authority saying that such an action is maintainable.

PATTESON J. The action against the executor of a parson for dilapidations is an anomalous action, which appears like an exception to the general rule, that *actio personalis moritur cum personâ* (a). The authorities do not shew that such an action is maintainable, where the buildings, hedges, and fences belonging to the benefice are left in a state of decay, or where there has been a felling of timber otherwise than for repairs or fuel. I am not disposed to extend the action to a case like the present.

Rule refused.

(a) But is not so. See 1 *Saund.* 216 a. note (a), 5th ed.

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WEDGE *against* NEWLYN and Others.

TROVER for horses and waggons, and various articles of furniture. Plea, not guilty. At the trial before *Taunton J.*, at the *Winchester* Summer assizes, 1832, it appeared that the defendants seized the goods in question under the authority of a commission of bankrupt against one *Smith*, a miller. Before the time of the seizure, *Smith*, having been arrested at the suit of the plaintiff for 195*l.*, gave him a bill of sale of the above-mentioned goods, defeasible on payment of the debt by *Smith* on a certain day; the debt was not then paid, and the plaintiff took possession. The defendants' counsel contended that the bill of sale was, substantially, a transfer of all *Smith's* property, and was, therefore, such a fraudulent conveyance of *Smith's* goods and chattels as constituted an act of bankruptcy (*a*), and justified the seizure, which took place subsequently under the commission. No specific account was given in evidence of the amount of *Smith's* whole property at the time of the seizure. The premises, where it took place, were a house, mill, and stable. *Lipscomb*, the attorney who prepared the bill of sale and took possession under it, stated that he took it for granted *Smith* had no property except upon these premises. Nothing was seized in the mill, where there were some fixtures belonging to *Smith*

A trader conveying away property to such an extent as will prevent him from continuing his business, and render him insolvent, commits an act of bankruptcy. But those who rely upon such act of bankruptcy on a trial, must shew that it was calculated to have the alleged effect, by evidence of the general state of the party's affairs at the time of such conveyance.

It is not sufficient to prove that the trader, under pecuniary pressure, disposed of some article essential to the carrying on of his business; as that a miller, by bill of sale, transferred his waggon and horses to a creditor who had arrested him.

1 Br. 545.

(*a*) By 6 G. 4. c. 16. s. 3. it is an act of bankruptcy if the trader shall "make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels;" or "make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels."

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(bought six years before for 30*l.* or 40*l.*), and a sacks of wheat and beans. The waggon and horse were taken from the stable, and were those which Smith used in his business of a miller, and were necessary for carrying it on. The whole of the goods seized produced, on the sale, 144*l.* When *Smith* was arrested on the plaintiff's suit, there was another writ out against him, and it appeared from his conversation with *Lombard*, the result of which was his giving the bill of sale that he was in considerable pecuniary difficulty. *Trotter J.* in his summing up stated the law to be, that if a man dispose of his stock in trade or goods and chattels to such an extent as to disable himself from carrying on his business as a trader, and make himself insolvent, such conveyance is fraudulent; it must not be a transfer of all his goods and chattels; it is necessary to shew that he had bankruptcy in contemplation, if he knew that in making the conveyance he became insolvent and unable to go on with his business. The result in that case must be that the creditors in general are delayed, and suffer injury in proportion as the particular creditor is benefited. The learned Judge left it to the jury whether *Smith*, in executing the bill of sale to the plaintiff, did so disable himself from carrying on his business as a miller. The court adverted to the articles in the mill which were taken, but desired the jury to consider what proportion they bore to the whole property, which was sold for 144*l.* The jury found a verdict for the defendants. A rule nisi was afterwards obtained for a new trial, on the ground that there was no sufficient evidence of an intent of bankruptcy, and that the case had not been properly left to the jury.

Erle now shewed cause. It was fully made out that, substantially, all the property of *Smith* was transferred by the bill of sale. If there were exceptions, they were merely colourable; at least that point was left to the jury, for the learned Judge desired them to say what proportion the omitted articles bore to those included in the bill of sale. That was a point entirely for them, and their finding upon it was in favour of the defendants. It is clear that *Smith* disabled himself from carrying on business when he sold the waggon and horses, which were essential to his trade of a miller. [*Denman* C. J. The same might be said of any part of the machinery of the mill. *Parke* J. If they had taken a millstone, the same argument might have been used; but the answer would be, that the party was perhaps able to buy another.]

Follett contra. To make the parting with these goods an act of bankruptcy, the general state of *Smith's* property should have been shewn. It is true that if a man conveys his *whole* property, with only a colourable exception, he commits an act of bankruptcy; but it is assumed here, without sufficient evidence, that the property conveyed was *the whole*, within this rule; if it was not, the conveying part only of a man's effects is no act of bankruptcy, unless it amount to a fraudulent preference, which was not proved here. It was asked, on the trial, whether or not a waggon and horses were necessary for carrying on the business of a miller; they might be so, but the question was, whether, having parted with them, he had not the means of procuring others. A conveyance of stock or goods, to constitute an act of bankruptcy within the rule relied upon, must be

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be such as necessarily and immediately causes a stoppage of the trade. The only evidence here, as to the general state of *Smith's* property, was the supposition of *Lipscomb* that he had none except at the mill, and the premises where the goods were taken.

Per Curiam (a). We think this rule should be absolute; perhaps, on another trial, the evidence may be more complete. On this occasion it rather fell short. It is incumbent on the party who sets up an alleged bankruptcy of this description, to shew the general state of the property to have been such that insolvency would be the effect of the transfer. Here it was not stated what the whole of *Smith's* property amounted to. For any thing that appeared in evidence, he may have had large sums of money due to him at the time of the conveyance.

Rule absolute.

The cause was tried a second time before *Alderson* at the Summer assizes, 1833, when more particular evidence was given of the state of *Smith's* affairs at the time of his executing the bill of sale; and *Alderson* left it to the jury whether he, by that instrument, conveyed away so much of his property as to incapacitate himself from carrying on his business by the insolvency which would ensue. The jury found for the defendant. A new trial was moved for in the ensuing term; but the learned Judge, on being referred to, expressed himself satisfied with the verdict, and the Court refused a rule.

(a) *Denman C. J., Littledale and Parke Js.*

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The KING *against* GOLDSMITH.Friday,
May 4th.

THE Solicitor-General in last *Michaelmas* term obtained a rule calling upon *Thomas Goldsmith* to shew cause why a quo warranto information should not be exhibited against him, to shew by what authority he claimed to be mayor of the borough of *Sudbury*, in the county of *Suffolk*; on the ground that there was not a majority of capital burgesses present at the meeting at which he was elected, or the meeting at which he was sworn in.

By charter of *Car. 2.* there were to be in the borough of *S.* a mayor, aldermen, and twenty-four capital burgesses. On the death or removal of an alderman the mayor and aldermen, or the greater part of them, were to elect a capital burgess to supply his place; when a capital burgess died, &c. the mayor, aldermen, and other capital burgesses, or the greater part of them, were to elect a successor from among the inhabitants and burgesses; and the mayor was to be annually elected on a certain day "by the burgesses of the said borough, or the greater number of them," with the consent of

The mayor, aldermen, and burgesses of the borough of *Sudbury* were incorporated by charter of 16 *Car. 2.*, and it was thereby granted that in the said borough "there might and should be from time to time seven persons of the elder and principal, better and more honest inhabitants of the said borough, who should be called the aldermen of the said borough, out of which said seven aldermen one of them should be the mayor of the said borough, and that there might and should be twenty-four persons of the better and more discreet and more honest men and inhabitants of the said borough who should be called the capital burgesses of the said borough for the time being." And that whenever any such alderman should die, be removed, or

twenty-four freeholders and inhabitants to be chosen as directed by the charter. In practice, the mayor had always been elected by the capital burgesses only. At the election of mayor on the charter day in 1832, there was not a majority of the number of twenty-four capital burgesses present, and no other burgesses attended:

Held, that this did not avoid the election, for that the word "burgesses" in the charter (where it treated of the election of mayor) could not be construed to mean only capital burgesses; that the right of election did not devolve upon the body of capital burgesses by the mere forbearance of the other burgesses to interfere; and that the capital burgesses, in electing the mayor, acted in the capacity of burgesses merely.

depart

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depart the borough, it should be lawful "for the mayor and other aldermen of the said borough then surviving or remaining, or the greater part of them, to elect, nominate, and appoint one other better, more honest and discreet man of the twenty-four capital burgesses of the said borough for the time being, to be an alderman in the place of him so dying," &c. And that when any of the twenty-four capital burgesses should die, it should be lawful "for the mayor and aldermen and other capital burgesses of the said borough then surviving or remaining, or the greater part of them, to elect, nominate, and appoint one other better, more honest and discreet man of the inhabitants and burgesses of the borough aforesaid unto the aforesaid number of twenty-four capital burgesses, and to fill the place and office of capital burgess of the borough aforesaid, in the place of him so dying," &c. And it was further granted by the charter, "that the burgesses of the said borough for the time being, or the greater number of them, might, with the consent of twenty-four men who should be freeholders and inhabitants of the said borough, and chosen and nominated by the mayor and aldermen of the said borough, or the greater part of them for the time being, from thenceforth for ever yearly upon *Monday* next before the Feast of the Nativity of the blessed Virgin *Mary*, between the hours of nine and eleven in the forenoon of the same day assemble, and might and should be able to assemble together in the common hall of the borough aforesaid, or in any other convenient place within the said borough of *Sudbury*, and should and might freely and lawfully elect and nominate one of the aforesaid aldermen of the borough

boron

borough aforesaid for the time being to be mayor, or into the office of mayor of the said borough, which alderman so elected into the office of mayor, should upon *Monday* next after the Feast of *St. Dionysius* immediately following the said election, take his corporal oath before the old mayor and the steward of the said borough, or his sufficient deputy, faithfully to execute the said office, and should remain and continue in the said office from the said *Monday* next after the said Feast of *St. Dionysius*, for one whole year."

The affidavits in support of this application stated, that on the 3d of *September* then last past (being the *Monday* next before the Nativity, &c.), there were only five aldermen and sixteen capital burgesses of the said borough in existence; and that on that day, at a pretended court of the corporation, *Thomas Goldsmith*, now claiming to be mayor of the borough, was alleged to have been elected mayor: and that there were not then present thirteen capital burgesses of the borough, but only eleven; and that at a pretended court on the 10th of *October* following (being *Monday* next after, &c.) at which the said *T. G.* was sworn in as mayor, there were only ten capital burgesses present. The affidavit in answer did not materially vary the state of facts.

Sir *James Scarlett* (with whom was *B. Andrews*), now shewed cause. The objection is, that a majority of capital burgesses were not present at the election or swearing in. But by the express words of the charter the election is in the *burgesses*, with the assent of twenty-four freeholders. Where *capital burgesses* are meant, as distinguished from burgesses, the charter designates

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signates them accordingly. As to the swearing in, charter has no words to support the present objection.

The *Solicitor-General* and *Kelly*, being here called upon to support the rule, contended, that on reference to the whole charter, the word *burgesses* must be taken to have been inaccurately used for *capital* burgesses, and that the Court would rectify such inaccuracy by reasonable intendment. But,

Per Curiam (a). The words of the charter are plain to be got over, and it is not even shewn that in practice the privilege of electing has been confined to the capital burgesses.

The rule was therefore discharged.

Kelly, on a subsequent day (*May 7th*), moved again for an information to the effect above mentioned, the affidavit of a burgess, who deposed, in addition to the matters above stated, with reference to the day of election, that during all the time he had lived at *Sudbury* and had been such burgess, and, as he was informed and believed, from the time of granting the charter, it had been, and still was, the invariable usage and custom of the borough for the mayor to be elected at a court of orders and decrees, consisting of the mayor, aldermen and capital burgesses, assisted by the twenty-four freeholders in the charter mentioned, and consisting and attended by no other persons whomsoever. And that the election of such mayor takes place by the majority of the said capital burgesses, with the assent

(a) *Denman C. J., Littledale and Parke Js.*

the said freeholders, and that none of the burgesses or free burgesses at large, who are several hundreds in number, ever attend or have notice to attend at such election of mayor: and the deponent verily believed that none but the mayor, aldermen, and capital burgesses and freeholders aforesaid attended the said supposed election on the 3d of *September*, or had notice to attend the same; and that the deponent himself received no such notice.

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Kelly, on this statement, contended that the election could not be valid. By the words of the charter, the election is in the burgesses; but by usage, the capital burgesses have always elected. Let the right be supposed to reside in either body; if the capital burgesses are to elect, there was not a majority of them present; if the burgesses at large, none attended, or had notice. [*Denman C. J.* Was any notice necessary, the election being on the charter day? *Parke J.* Are not the capital burgesses burgesses?] It may be questioned whether they are, for the purpose of this election. The charter distinguishes them, when it says that the *capital burgesses* shall be elected from among the *burgesses*.

Per Curiam (a). The capital burgesses do not cease to be burgesses. At most the case only amounts to this, that it has been the usage of the inferior burgesses not to take part in the election of mayor. But this usage is not to control the charter; and it is impossible to say that the general word *burgesses* there employed in

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reference to the election of mayor, is meant to signify capital burgesses, when these are so expressly distinguished in other parts of the charter. If the burgesses in general have been prejudiced by not exercising their rights, they should have known them better.

Rule refused.

Friday,
May 4th.

The KING *against* ROLFE.

132. ad. 844

On motion for a quo warranto information, an affidavit stating the relator's information and belief that the officer was elected at a court held on a certain day, and there was not at the court where he was elected as aforesaid, a proper number of electors present, is answered if it be sworn that there was a proper number of electors at the court held on the specified day, and that the officer was not elected at that court. The officer is not bound to answer for the proceedings of any other day than that specified by the relator.

THIS was a motion for a quo warranto information calling upon *William Rowland Rolfe* to shew what authority he claimed to be a capital burgess of *Sudbury*, on the grounds that there was not a majority of the aldermen or of the capital burgesses present at a meeting at which he was supposed to be elected, and that there was no proper notice of such meeting. An affidavit (sworn by a burgess) in support of the motion set out the charter as in the preceding case (*ante*, p. 843) and the relator then stated as follows: —

“ That he has been informed and verily believes that one *W. R. Rolfe* was nominated to be a capital burgess of the said borough at a court, or pretended court of the corporation, held on the 3d of *September* 1827, and that he was elected and sworn into the office of capital burgess aforesaid, at a court, or pretended court of the said corporation, held on the 15th of *October* 1827. That he has been informed and verily believes, that at the respective times of the nomination and election and swearing in of the said *W. R. Rolfe* as aforesaid, there were in existence only five aldermen of the said borough, viz. &c., and that there were not present at the court

or pretended court, at which the said *W. R. R.* was nominated as aforesaid, or at the said court, or pretended court, at which the said *W. R. R.* was elected and sworn in a capital burgess as aforesaid, four of the said aldermen of the said borough." There was a statement similarly worded, with respect to the number of capital burgesses in existence and present when the two courts were holden.

The relator also stated his information and belief, that previous to the nomination or election, and swearing in of the said *W. R. Rolfe* as aforesaid, no summonses were issued to the members of the corporation to give them notice of courts to be holden for the above respective purposes, nor was the bell rung at the top of the Moot Hall, to announce the holding of the said courts, as the practice had been till within the last four years.

The affidavits in answer stated that, at the courts holden on the 3d of *September* and 15th of *October*, mentioned in the relator's affidavit, there were present, on the first occasion four aldermen and fifteen capital burgesses, and, on the second, four aldermen and sixteen capital burgesses. But they added, that the said *W. R. Rolfe* was not nominated a capital burgess at the said court holden on the 3d of *September*, nor elected and sworn in at the said court holden on the 15th of *October*. There were also statements as to the notices of holding the courts, which it is not material to go into.

Sir *James Scarlett* and *B. Andrews* now shewed cause. The relator has sworn to his information and belief only, that *Rolfe* was nominated, and elected, and sworn in on certain days, when there was not a sufficient number of electors present. On the other

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hand, it is positively stated that there was a proper number present on those days; and, further, that the days were not the days on which *Rolfe* was elected. The *prima facie* case made by the relator is answered, and he is not bound to go farther and prove his title by shewing what passed on the days when he actually was nominated, elected, and sworn in.

The *Solicitor-General* and *Kelly* contra. Sufficient ground is laid for granting the information. The information, if granted, does not conclude the party. The relator cannot be expected to swear to more than his information and belief, not having the means of obtaining actual knowledge. He states that he is informed and believes that *Rolfe* was nominated, and elected, and sworn in at courts holden on certain days, and that at the times of his nomination, and election, and swearing in, as aforesaid, there were not present the proper number of aldermen and capital burgesses. The affidavits in answer do not say that the proper numbers were present on the days when he was actually nominated, elected, and sworn in. They do not, therefore, meet the *prima facie* case. The relator was obliged to assign certain days; but, as in the case of an indictment, he is not bound to the days stated. The affidavits in answer ought to have shewn, that whenever the party was elected, his election was regular.

DENMAN C. J. The *prima facie* case is not supported. A relator cannot say to the Court, that whenever the officer was elected, he was not duly elected. He must know and state when the party was elected, and establish a *prima facie* case referable to that time.

Here that has not been done. An officer ought not to be required, on such an application, to give an account of all that passed on any day. And I, for one, should be very slow to grant a rule of this kind after the lapse of five years, unless in a case which left the Court no discretion.

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LITLEDALE J. concurred.

PARKE J. I think the days assigned were material. There might be a sufficient *prima facie* case to call on the party for an answer as to those particular days; but if that answer is given, enough is done to meet the application. As it has been put by my Lord, a relator is not entitled to say, that whenever an officer was elected, he was unduly elected. The rule will, therefore, be discharged.

Rule discharged.

The KING *against* MAY.

Saturday,
May 4th.

THIS was a motion for a quo warranto information, calling upon *William Oliver May* to shew by what authority he claimed to be a capital burgess of *Sudbury*, on the grounds that there was not a majority of the aldermen, nor of the capital burgesses, present at the meeting at which he was supposed to be elected, or at the meeting at which he was sworn in; and that due notice was not given of the former meeting.

Where it is granted by charter, that a corporation shall have so many aldermen and so many capital burgesses; and that when one of the latter shall die, depart, or be removed, another shall be elected

in his place by "the mayor and aldermen, and other capital burgesses then surviving or remaining, or the greater part of them;" the election must be made by a majority of the full numbers of aldermen and of capital burgesses: a mere majority of the members of both bodies, who happen to survive at the time, is not sufficient.

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The relator's affidavit was similar to that in *Re Rolfe (a)*. It set out the charter as before, and stated that *May* was nominated a capital burgess of a court, or pretended court, on the 6th of September 1830, and was elected and sworn in at a court, or pretended court, on the 11th of October 1830. That at those times there were in existence only five aldermen of the borough; that there were not four of them present at either court, and at the latter only two. That at the said respective times there were only six capital burgesses in existence, and that there were thirteen present at either court.

In the affidavits on the other side it was sworn, of five aldermen, (including the mayor), who were living at the times in question, three, including the mayor, were present at the first court, and all the five at the second; and that of sixteen capital burgesses, were surviving at those times, nine were present at each court.

Sir *James Scarlett* and *B. Andrews* now shewed cause. The words of the charter are, that capital burgesses shall be elected, nominated, and appointed by "the mayor and aldermen and other capital burgesses of the said borough then surviving or remaining, or the greater part of them." Here, it is true, there was not a majority of the full number of each elective body; but there was a majority of the survivors. *Rex v. Devonshire (b)* was cited in moving for the rule; but there the Court, in interpreting the clause which is deemed analogous to this, guided by other clauses of the charter (all relating

(a) *Ante*, p. 840.

(b) 1 B. & C. 609.

elections by one single class, the capital burgesses), which left no doubt of the intention, and which are not found here. The words here import that the surviving members of the different elective bodies, or the majority of the whole number of survivors, shall elect. The mayor must, of course, be present, because he is specially named; but of the other parts of the corporation, the survivors, who are all thrown together into one class, or the greater part of them, are to elect. If it had been, "the greater part of them respectively," the case might have been different. The attempt on the other side is, to read the clause as if "then surviving or remaining" were struck out. It was not intended by the charter that, if a majority of either elective body were lost, the corporation should be dissolved.

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DENMAN C. J. There may be distinctions drawn between this case and *Rex v. Devonshire (a)*; but they are the same in principle. The rule must be absolute.

LITLEDALE and PARKE Js. concurred.

Rule absolute.

A similar rule was then made absolute on the same ground, in *Rex v. Bridgman*.

(a) 1 B. & C. 609.

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CLARKE *against* POWELL.

A stockbroker is a broker within 6 *Anne*, c. 16. and 57 G. 3. c. lx., and liable to the penalty imposed by the latter statute for acting as a broker without having been admitted by the court of mayor and aldermen of *London*.

DEBT for penalties for acting as a broker within the city of *London*, in purchasing 50*l.* 3 per cent. and procuring the same to be transferred in the book of the governor and company of the bank of *England*; the defendant, not being at the time of such purchase and transfer, or either of them, admitted by the court of mayor and aldermen of the city of *London* to be a broker, or to act as a broker, within the said city. Plea, the general issue. At the trial before Lord *Terden* C. J., at the *London* sittings after *Trinity* term 1830, the jury found a special verdict for one penalty of 100*l.*, which stated, in substance, as follows:— Since the making of the statute 6 *Anne*, c. 16., and the statute 57 G. 3. c. lx., divers persons have taken upon themselves to act within the city of *London* and liberties thereof, in the buying and selling of the public joint stock of government annuities, transferable at the bank of *England*, and other public securities, for other reward in that behalf, such persons so acting and having been admitted by the court of mayor and aldermen of the said city to be brokers in pursuance of the said act of the 6 *Anne*; and since the passing of the said acts, divers other persons have so taken upon themselves to act within the city of *London* and liberties thereof, in the buying and selling of the public joint stock of government annuities, transferable at the bank of *England*, and other public securities, for other

for reward in that behalf, and such last-mentioned persons have been admitted by the said court of mayor and aldermen to be brokers, and to act as brokers in pursuance of the said act of the 6 *Anne*; and have been, and are, from time to time, required to make and execute upon such admissions, the broker's bond of the city of *London*. Since the 27th day of *June* 1817, viz. on the 8th of *July* 1829, within the said city of *London*, the defendant did, for reward to him in that behalf, purchase for *John Johnson*, of one *Norman Wilkinson*, a certain interest or share, amounting to the sum of 50*l.*, in a certain public joint stock government annuity, transferable at the bank of *England*, that is to say, in the capital or joint stock called the reduced 3 per cent. annuities, transferable at the bank of *England*; and did then and there procure the said sum of 50*l.* interest or share in the said stock, to be transferred by *N. W.* to *J. J.*, in the books of the governor and company of the bank of *England*, and did receive from *J. J.*, as a reward and commission for such purchase and transfer, the sum of 1*s.* 3*d.*, (a) [and did, from time to time, both before and since the said 27th day of *June*, on various occasions, buy divers shares in the government securities, transferable at the bank of *England*, for divers other persons, for reward in that behalf,] and was not, at the time of the said purchases and transfers, or of any of them, admitted by the court of mayor and aldermen of the city of *London* to be a broker, or to act as a broker, within the said city, nor had he obtained any admission by or from such court.

(a) The words between crotchets were inserted in the special verdict, after the argument, at the suggestion of the Court.

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The bond before 1818 was in the penalty of conditioned as follows:—“ That the party whose mission is recited should faithfully execute his office in his employment without fraud, and should, upon every contract, bargain, or agreement made by him, declare the same to be made known to such person or persons with whom the agreement was made, the name of his principal, and the name required; and should keep a book or register, and therein fairly enter all such contracts, &c. within three calendar months, and should, upon demand made by either of the parties, the buyer or seller, produce such entry, and prove the truth and certainty of such contracts, &c.: and, for satisfaction of all such persons as should doubt whether he was a lawful and sworn broker, should produce a certain number of oaths, and should not, directly or indirectly, by himself or any other, deal for himself or any other broker in the buying or change or remittance of money, or in buying any goods, or tallies, order or orders, bill or bills, share or shares, or interest in any joint stock to be transferred or assigned to himself or any broker, or to any other in trust for himself or them; or in buying any goods, wares, and merchandises to bargain or sell again upon his own account, or for his own or for any other broker's benefit or advantage; or to make any gain or profit in buying or selling any goods over and above the usual brokers' commission; and should discover any person whom he should suspect to be acting as broker, not being duly authorised by the Court, should not employ any one under him to act as a broker, not being duly admitted; and should not presume to sit, stand, and assemble in *Exchange Alley*, or other public place, or passages within the city, and liberties thereof, but only than upon the Royal Exchange, to negotiate his

ness and affairs of brokerage to the annoyance or obstruction of any of his Majesty's subjects, or any other, in their business or passage about their occasions."

The form of bond after 1818 was in 1000*l.*, and conditioned as the former bond, except that there was a condition for giving either to the buyer or seller, within twenty-four hours after demand, a contract note, containing therein a true copy of the entry to be made in the "*broker's book*;" and that the stipulation respecting the assembling in *Exchange Alley* or other public places, was omitted. This case was argued in *Michaelmas* term.

Follett for the plaintiff. The question is, whether a person acting as a stockbroker within the city of *London*, or its liberties, is a broker required by the statute of 6 *Anne*, c. 16., to be admitted to that office by the court of the mayor and aldermen of the city of *London*. That statute subjects a party acting as a broker within those limits, and not having been so admitted, to a penalty of 25*l.* By the 57 G. 3. c. lx. that penalty is increased to 100*l.* In *Janssen v. Green* (a) it was decided, that a stockbroker was a broker within the meaning of the statute of *Anne*, and the authority of that case was recognised in *Gibbons v. Rule* (b), where it was decided that a shipbroker was not within the act, because he was not a person who bought and sold for another. In popular language, a broker is a person who makes contracts for others. One of the definitions given of the word *broker*, in *Johnson's Dictionary*, is "one who does business for another." In *Jacob's Law*

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Dictionary brokers are described, "Those who bargain in matters of money or merchandise;" enumerates exchange-brokers, corn-brokers, brokers in stock, and pawnbrokers. In *Blunt's Law Dictionary* mentioned "exchange-brokers, mediators in a contract of buying and selling, or contracts of mortgage and pawnbrokers." In *Cowell* there is a similar definition. The stat. 1 Jac. 1. c. 21.(a) gives the *London* the power of admitting brokers, and defines them as persons who make contracts between merchants and tradesmen. The meaning of the term in the statute of *Anne* is to be collected from other legislation passed about the same time. It is said that, at the time of the passing of the statute c. 16. there were no stocks transferable in the *City of England*; but there were government securities then transferable. The 8 & 9 W. 3. c. 20. is entitled "An Act for making good the Deficiencies of the Funds therein mentioned, and for enlarging the Stock of the Bank of *England*, and for raising the Public Credit;" and section 60. imposes a penalty of 20% upon every person who shall be employed as a broker on the behalf of any person to make or execute any bargain or contract for the buying or selling of orders or tallies (in the act mentioned), who shall receive more than 2s. 6d. per cent. for brokerage." This shows that, before the statute of the 6 *Anne*, the legislature applied the term broker to a person buying and selling public securities. The 8 & 9 W. 3. c. 32. (which was in force for three years only) provided that no person should act as a broker in making bargains respecting

(a) See p. 857. post.

any bank stock, or any tallies, bills of credit, or tickets payable at the receipt of the exchequer, or at any of the public offices, who had not been admitted a broker within the city of *London*; and in the fifth section, which imposes a penalty of 500*l.*, the word *broker* is constantly used in reference to stock (*a*). By 10 *Anne*, c. 19. s. 121., a penalty is imposed on every person “who shall be employed as a broker, in the behalf of any other person, to make any bargain, or contract for the buying or selling of any tallies, orders, exchequer bills, exchequer tickets, bank bills, or any share or interest in any joint stock erected by act of parliament, &c., who shall take or receive, directly or indirectly, any sum of money, or other reward, exceeding the sum of 2*s.* 9*d.* per cent.” The 6 G. 1. c. 18. s. 21. enacts, “that if any broker, or person acting as a broker for himself, or on behalf of any others, shall bargain, sell, buy, or purchase, or contract or agree for the bargaining, selling, buying, or purchasing of any share or interest in any of the undertakings by that act declared to be unlawful, or in any stock, or pretended stock, of such undertakers,” he shall be disabled from practising as a broker, and also forfeit the sum of 500*l.* It appears, therefore, from these several acts (which are nearly contemporaneous with the stat. 6 *Anne*, c. 16.) that the legislature used the word broker as descriptive of a person who made contracts for others in merchandise, transferable stock of private companies, or government securities. The 7 G. 2. c. 8. s. 4. imposes a penalty of 500*l.* upon all brokers and agents, negotiating any contract for the buying, selling, assigning, or transferring

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(*a*) See p. 858. post.

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of any public or joint stock, or other public security whatsoever, which the person on whose behalf the contract shall be made, shall not at the time of making the contract be actually possessed of or entitled to in his own right, &c. Sect. 4. also imposes a penalty on brokers negotiating other bargains respecting which are prohibited by the act. But *Janssen v. Green* (a) is an authority expressly in point to shew that a stockbroker is a broker within the meaning of the statute of 6 Anne, c. 16. (He was then stopped by the Court.)

Campbell, Solicitor-General, contra. Stockbrokers are regulated by a general act of parliament, and are not required by 6 Anne, c. 16., to be admitted to the court of the mayor and aldermen of London. The statute ought to be strictly construed; for it is not penal, but it imposes a tax on one part of his Majesty's subjects for the benefit of another. The statute 5 Geo. 2, c. lx. is similar in its nature. It is for increasing the payments to be made by brokers, and it raises the penalty to 100%. As the statute itself does not contain a definition of the word *broker*, the meaning of that word may be collected from other acts of parliament. The Court cannot adopt either the popular or mercantile use of the word *broker*; for there are various persons called brokers who are not within the meaning of the statute, as furniture brokers, ship brokers, and, probably, insurance brokers. A broker is a person whose employment is to buy and sell for another some visible, tangible commodity, capable of being sold or bought very. If the word be not so confined, an insurance broker

(a) 4 Burr. 2103.

broker might be considered within the act, for he buys and sells for others a contract of indemnity; or an attorney, who buys and sells for others the grant or assignment of an annuity. If the latter be not within the act, a stockbroker is not, for he only buys and sells the assignment of a government annuity. Now it has been frequently held, that the public securities are not goods and chattels. The true definition is to be found in the 1 *Jac.* 1. c. 21.: it recites, that “Of long and ancient time, by divers hundred years, there have been used within the city to be selected persons meet to be brokers, &c., who take their oath to use and demean themselves uprightly and faithfully between merchant *English* and merchant strangers and tradesmen, in the contriving, making, and concluding bargains to be made between them, *concerning their wares and merchandises* to be bought and sold and contracted for within the city of *London*, and *monies to be taken up by exchange.*” The subject-matter of the contracts made by brokers is described as wares and merchandise, and money taken up by way of exchange. Now the brokers referred to in 6 *Anne*, c. 16., must have been those who had been so denominated by the ancient usage of *London*; and whose dealings were in respect of goods and chattels and monies taken up by exchange. The statute 8 & 9 *W. 3.* c. 32. was not in force when the statute 6 *Anne*, c. 16. was passed. The penalties imposed by the latter statute ought not to be extended to brokers and stock-jobbers, or pretended brokers, mentioned in a statute which had expired. *Janssen v. Green* (a) cannot be sup-

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ported. Lord *Mansfield*, in considering the statute *6 Anne*, adopted the definition of the word broker in an act of parliament passed near thirty years afterwards. The very circumstance of that act having passed so long after, for the regulation of stockbrokers, raises the inference that those persons were not to be included by the legislature in the statute of *6 Anne*. It is clear that in the 8 & 9 *W. 3. c. 20. s. 6* the legislature contemplated that other persons besides stockbrokers might make purchases and sales of stock. It speaks of persons employed as brokers, solicitors, or otherwise, to make bargains. One of the conditions of the bond which brokers were compelled to enter into was, until the year 1818, that they should carry on their business in the *Royal Exchange*, and not in *'Change Alley*. Now, the stock exchange was, at that time when the stat. 6 *Anne, c. 16.* passed, and in that place of business for buying and selling. [*Littledale J.* The question, whether a stockbroker was within the act, cannot depend on the terms of the condition of the bond.] Stockbrokers are regulated by general law, the 7 & 8 *G. 2. c. 8.* [*Parke J.* The act merely obliges them under a penalty to keep books. It contains no other general regulation for stockbrokers. To impose a tax on those who deal in the securities, would be indirectly laying a tax on the transfer of those securities.

Cur. adv. sol.

LITTLEDALE J., in this term, delivered the judgment of the Court. This case was argued before my brother *Parke* and myself, in the course of last *Michaelmas*.

and the question upon the record is, whether a person who, on various occasions, buys shares in the government securities, transferable at the bank of *England* for other persons, for reward,—in ordinary parlance, a stockbroker,—be within the provisions of the 6 *Anne*, c. 16., and the 57 G. 3. c. lx., and liable to penalties for acting as such, under the latter act, in *London*, without having been admitted by the mayor and aldermen of the city of *London*.

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The first of these acts abolishes the office of garbler of spices, by repealing the statute of 1 *Jac.* 1., and gives an equivalent to the city by the admission of brokers. The fourth section recites, that the profits of the said office are part of the revenues of the city of *London*, and were then leased to *W. Stewart*, under a rent of 300*l.* per annum; the profits of which office, and the right of the said *W. Stewart* to the same, by repealing the said act, would be very much diminished: it then enacts, that “all persons that shall act as brokers within the city of *London* and liberties thereof, shall, from time to time, be admitted so to do by the court of mayor and aldermen of the said city for the time being, under such restrictions and limitations, for their honest and good behaviour, as that court shall think fit and reasonable; and shall, upon such their admission, pay to the chamberlain of the said city for the time being, for the uses therein-after mentioned, the sum of 40*s.*; and shall also yearly pay to the said uses the sum of 40*s.* upon the 29th day of *September* in every year.” The fifth section provides, that “if any person shall take upon him to act as a broker within the city and liberties, not being admitted as aforesaid, he shall forfeit and pay the sum of 25*l.*, to be recovered by the chamberlain of the city.”

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The other of these acts, the 57 G. 3. c. lx., was for granting an equivalent for the diminution profits of the office of gauger of the city by the destruction of the *London Docks*, and for increasing the payment to be made by brokers. It raises the fee of admission, and the annual payment from admission by brokers, to 5*l.*, and increases the penalty upon a broker "for taking upon him to act as a broker," to 100*l.*

The very question now raised by this record was decided by the Court of King's Bench upon a similar case, in the case of *Janssen v. Green* (a); and by that decision we ought to be bound, unless we are satisfied that it is contrary to law. The question has been fully and elaborately argued before us; and from the result we see no reason to think that the decision is wrong.

It was very strongly urged by the Solicitor-General that the clause in the statute of *Anne*, which enacts that all persons "who shall act as brokers" in the *London*, shall be admitted, and pay the sums therein mentioned, ought to be strictly construed, as it imposes a tax, and that upon persons who derive no advantage from the abolition of the office for which the payments are given as a compensation. The act, however, appears also to have had in view the regulation of brokers and to have secured and enforced the ancient right of the city to admit brokers, which, by the *statuta civitatis Londinensis*, 13 *Ed.* 1. (b), it appears to have possessed in the earliest times. But supposing that such a strict construction ought to prevail, because the act imposes a tax for the benefit of an individual, and a corporation, it is

(a) 4 *Burr.* 2103.(b) See *Ex parte Dyster*, 1 *Mer.* 173. no

that the statute extends to *all* persons who shall act as *brokers*; and the question is, what persons fall within that description? All who do are equally liable to the tax, and all are alike taxed, without any corresponding benefit; for the abolition of the office of garbler appears to have conferred no more benefit on one class of brokers than another. But as the legislature has imposed the burthen on *all* brokers, all, that we are judicially satisfied were intended to be included in that denomination, must bear it.

In order to ascertain who these are, the statutes, and particularly those which were passed about the time with the act in question, furnish us with the best means of information.

The 1 Jac. 1. c. 21. recites, that persons have been admitted as brokers, who have taken their oaths on admission “to use and demean themselves uprightly between merchant *English* and merchant strangers, and tradesmen, in contriving, making, and concluding bargains and contracts to be made between them concerning their *wares and merchandizes* to be bought and sold and contracted for, within the city of *London*, and monies to be taken up by exchange between such merchant and merchants, and tradesmen, and these kind of persons have had and borne the name of brokers, and been known, called, and taken for brokers.” The act proceeds to declare that persons who buy and sell, and take pawn of garments, &c. are not brokers, but frippiers, and to provide a remedy against illegal pledges; and the last clause provides that nothing in the act contained shall be prejudicial to the ancient trade of brokers between merchant and merchant or other traders or occupiers within the city, being selected as therein mentioned.

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Though this was the occupation of regular brokers at that time, it is obvious that when a new subject of dealing was created in government securities, those who dealt in the same way respecting such securities, fall under the same denomination. The class of persons who dealt either partially or exclusively in this new description of security, might equally fall within the description of brokers as those who dealt partially or exclusively in some new description of merchandise.

That this was so, the statutes passed in the reign of King William clearly and decisively prove. The 9 W. 3. c. 20. s. 60. mentions *brokers* employed on behalf of other persons to make bargains and contracts for the buying and selling of orders of the treasury, and of tallies, which are described in the fifty-seventh section, and limits their brokerage to one per cent.

The 8 & 9 W. 3. c. 32., a temporary act, entitled "An Act to restrain the Numbers and ill Practice of Brokers and Stock Jobbers," after reciting that for the convenience of trade, sworn brokers have been and are admitted within the city of *London* for the making and concluding of bargains and contracts between merchant and merchant, and other tradesmen, concerning goods, wares, merchandizes, and monies taken in exchange, and for negotiating bills of exchange between merchant and merchant; and that brokers, stock jobbers, or pretended brokers, have lately carried on unjust practices in selling and discounting tallies, stock, bank bills, shares and interest in joint stock and other matters and things, and have combined to depress and fall from time to time the value of such tallies which is a great abuse of the said ancient trade of brokers employed

employment ; and that the number of such brokers and stock jobbers had very much increased within these few years, by reason that they were not at present under such regulations as are necessary to prevent the mischief aforesaid, for remedy, provides that no person or persons whatsoever shall directly use or exercise the office, trade, mystery, occupation, or employment of a broker, or act or deal as such within the cities of *London* or *Westminster*, borough of *Southwark*, or the limits of the weekly bills of mortality, in the contriving, making, or concluding bargains between merchant and merchant, or between merchants and tradesmen or others, concerning their wares and merchandizes to be bought and sold, and contracted for, monies to be taken up by exchange between such merchant and merchants, and tradesmen, or concerning any tallies, or orders, bills of credit, or tickets payable at the receipt of the exchequer, or at any of the public offices, or concerning any bills or notes payable by the governor and company of the Bank of *England*, or for or concerning any part of the capital or joint stock belonging or to belong to the said governor and company, or to any members of the said company, or for or concerning any share of the capital or joint stock belonging to any company or society that is or shall be incorporated by act of parliament, or letters patent, until such person shall be first admitted, licensed, approved, and allowed of by the lord mayor and court of aldermen for the time being, upon such certificate of their ability, honesty, and good fame as hath been usual.

The act then proceeds to direct the oath, to limit the number of brokers, to regulate the fee on admittance (not to exceed 40s.), and to impose a penalty of 500l.

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on those who use the trade, &c. of broker, or deal as brokers, and to provide that if any person being a sworn broker, shall negotiate and deal as broker in the discounting of tallies, exchequer bank bills or notes, or in stock jobbing, or sell bank stock or any other interest or securities, upon fund or funds granted by parliament, such person offending shall forfeit 500*l.* and stand in the pillory. The act proceeds to make further regulation of the keeping of books, the amount of brokerage (10 per cent.), and other matters; and also requires brokers dealing in tallies or securities on funds granted by parliament to be licensed by the treasury.

This act was limited to three years.

In the 6 G. 1. c. 18. s. 21. (passed twelve years after the statute of Queen *Anne*) a penalty is imposed upon brokers buying and selling shares in illegal takings.

The 7 G. 2. c. 8. s. 8. mentions "*brokers*" with reference to transactions of buying and selling stock.

Considering the provisions of these statutes, read before and after the passing of the statute 6 G. 1. it appears to us that persons buying and selling government stock and securities for others were considered *brokers* at that time, and must fall under that description in the statute in question.

If brokers dealing in government stock and securities then existing, were so, it does not admit of a doubt that those who dealt in all subsequently-created stock and securities of the like description, would be so; just as much as merchant brokers, who bought or sold in the same description of merchandize.

It was urged that the statute 7 G. 2. c. 8. was

for the regulation of stock brokers. That is not the case. It is for the purpose of preventing stock jobbing; and the only matter of regulation which it contains is, that brokers are to keep books, in which contracts are to be registered, under a penalty of 50*l.*; and unless the statute in question (the 6 *Anne*) gives the power of admission, with such restriction for their good behaviour as they think reasonable, to the mayor and court of aldermen, there is no power of admission and control over this important class of brokers in any person. Such a power is not absolutely necessary, and the legislature might have omitted to give it; but certainly it is not given by any other statute than this.

For the reasons above mentioned, and particularly from what may be deemed the contemporaneous exposition of the legislature itself in the statutes of 8 & 9 *W. 3. c. 20. & c. 32.*, we are of opinion that the case of *Janssen v. Green* (a) was rightly decided, and that judgment must be for the plaintiff.

Judgment for the plaintiff.

(a) 4 *Burr.* 2103.

The KING *against* SMITHSON.

Tuesday,
May 7th.

THE Solicitor-General had obtained a rule nisi for a criminal information against the above party for a libel, imputing to the prosecutor that he had used certain unbecoming words at a public dinner. The rule was obtained on the single affidavit of the prosecutor, deny-

Where a rule for a criminal information had been discharged upon the merits, the Court refused to grant a rule to shew cause on a second application in the same case, upon additional affidavits.

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**The King
against
SMITHSON.**

ing that he had spoken the words. In opposition to the rule several affidavits were filed, contradicting the statement. The Solicitor-General thereupon consented that his rule should be discharged with costs. On the next day he again moved for a rule to shew cause why criminal information should not be filed against the same party for the same libel, offering in support of the rule, affidavits of several persons confirmatory of the facts sworn by the prosecutor: and as a precedent for such an application, he referred to a late case in which a rule was moved for on behalf of the Marshal of the King's Bench, against the publisher of a paper called the *Satirist*, and the affidavits being defective, the rule was discharged, but the Court allowed a second application to be made.

DENMAN C. J. We think that, according to the practice of the Court, we have no power to entertain such an application; and it would be dangerous for us were to do so. The rule is, that when affidavits have been answered, the party moving is not entitled to call others in reply; but that would, in effect, be done if we allowed the course now proposed. A party moving for a criminal information has some great advantage, and he may reasonably be required to collect all the necessary materials for his application when he first makes it. It is not suggested here that the party moved against has been guilty of any collusion or other improper conduct to obtain the discharge of the rule, but only that the prosecutor has been, in the first instance, less fully supplied with materials than he might have been. We think we ought not to grant the rule on such a ground.

L

LITTLEDALE J. To allow such a motion as this would in effect be admitting affidavits in reply.

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against
SMITHSON.

PARKE J. In the case referred to, the first rule was discharged merely on a defect in the proof of publication. But to grant the rule in this case would be a precedent for re-enquiry in almost every instance where a criminal information was moved for without success. It would rarely happen that the party would not be able to mend his case on a second motion. The prosecutor has another remedy. We must act upon the general rule: we should establish a very dangerous precedent by departing from it.

Rule refused.

Ex parte SANDYS, Gent.

Tuesday,
May 7th.

JOHN WILLIAMS moved for a rule to shew cause why a criminal information should not be filed against certain justices acting within the Western Division of the lathe of *St. Augustine*, in the county of *Kent*, for having maliciously and without reasonable cause removed Mr. *Charles Sandys*, an attorney, from the office of clerk to the petty sessions of the justices of peace for the said division. Mr. *Sandys* and a Mr. *Pierce* were nominated and appointed clerks to the said justices by an order of petty sessions in *March* 1806, on the resignation of the preceding clerk. In 1814 *Pierce* resigned, and at a meeting of the said justices in special sessions for the amendment of the highways, it was ordered that *Sandys* should be, and he was, by such order, elected and appointed sole clerk to the said

A clerk to justices in petty sessions, appointed by order of such sessions, has no legal hold upon his office, nor will this Court interfere if he is dismissed summarily, and without cause assigned.

1833.

 Ex parte
SANDYS.

justices. His remuneration was by fees, as regulated by 26 G. 3. c. 14., "for the settling and ascertaining fees to be taken by clerks to justices of the peace and other statutes. In 1833 one of the magistrates against whom this application was made, wrote to him in the name of the justices, informing him that he should dispense with his services from that time. The cause was assigned, nor would the magistrate, on application made to him for that purpose, state or afford him an opportunity of answering any charge which might have been made against him. It did not appear that any such complaint had in fact been presented. No order of petty sessions was made for his dismissal.

J. Williams now contended that the clerk had a right and interest in his office that the justices could not remove him at pleasure, and without cause assigned. He is appointed by an order of petty sessions; and his office is recognised, not only by 26 G. 3. c. 14., which provides for its emoluments, but by other statutes, particularly the Jury Act, 6 G. 4. c. 50. s. 10., and the Act for licensing public-houses, 9 G. 4. c. 61. s. 15.

Per Curiam (a). There is no ground for this application. A clerk to justices has no legal hold upon his office; he is only appointed to assist the justices in the exercise of an office during pleasure, like that of a vestry clerk. There must be no rule.

Rule refused.

(a) *Denman C. J., Littledale, and Parke J.*

1833.

In the Matter of FLOUNDERS, Esq.

Wednesday,
May 8th.

BENJAMIN FLOUNDERS, Esq., a justice of peace for the North Riding of *Yorkshire*, having made an order of allowance of surveyors' accounts, was served with the following notice on the 11th of *January* 1833:—

“ I do hereby give you notice that I shall, on the first day of next *Hilary* term, or as soon afterwards as I can be heard, move his Majesty's Court of King's Bench for a rule, calling upon you to shew cause why a writ of certiorari should not issue, directed to you, and calling upon you to certify and remove into the said Court a certain order of allowance, &c. and also the accounts so allowed, &c., in order that the said order of allowance, and accounts, &c. may be quashed, or otherwise dealt with according to the judgment and discretion of the said Court. Dated,” &c.

On the 19th he was served with a copy of a rule nisi, which was abandoned on the 21st, and a fresh rule obtained, and enlarged to the present term. No notice of intention to apply for a certiorari was ever served on the magistrate but that of *January* 11th. Notice of the enlarged rule was served on the 30th of *March*.

F. Pollock now shewed cause. The notice was irregular, for it was given on the 11th of *January*, which was the first day of *Hilary* term, and it states that *on the first day of Hilary term*, or so soon after as the party can be heard, a certiorari will be moved for.

The

Notice to a Justice of the Peace 128
magistrate
(under 13 G. 2.
c. 18. s. 5.),
of intention to
move for a
certiorari, “ on
the first day of
next term, or
so soon after as
I can be heard,”
is irregular if
served on the
first day of that
term, though
the party does
not, in fact,
move till after
the expiration
of six days.
Held, *Denn-
man* C. J.
dubitante.

2 Bac. 14.

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 ———
 In the Matter
 of FLOUNDERS.

The act 13 G. 2. c. 18. s. 5. directs that no ce shall be granted to remove proceedings before a unless moved for within six months, and unless proved on oath that the party suing forth the sa given six days' notice in writing to the justice, end that he may shew cause. The rule here not in fact be moved for till the expiration days, but the justice could not know that. [A By the act he ought to have six days before the which the application can be first made.] It the rule was enlarged, but that does not cure fective form of notice.

Sir *James Scarlett* and *S. Temple* contra. “ afterwards as I can be heard,” means, “ as I can be heard ;” that is, after the expiration of six [*Littledale J.* The rule is a four day rule.] I not be made absolute in less than six. [*Little The Court ought not to entertain the rule unless notice were first given. Parke J.* The notice effect, that the party must be ready on any day ; v he ought to have six days to prepare himself. A as it is now put, the notice is that the Court moved as soon as counsel can be heard.] In *D Lord Huntingtower v. Culliford* (a) notice was given tenant, dated the 27th of *September* 1822, to quit *Ladyday*, or at the end of your current year ;” the having entered in *August* 1821 ; and it was said this mean a current year which expired on the 29th *tember*, and so there would be only two days’ But the Court decided that the words must be t mean a six months’ notice, or such notice as the

(a) 4 D. & R. 248.

quired; the rule being to construe general language (in case of doubt) so as to make it sensible, not insensible. [*Littledale J.* The rule acted upon in that case has been long established, and does not apply to this. A landlord often does not know when the tenancy expires, but it is supposed to be within the knowledge of the tenant.]

1833.

In the Matter
of FLOUNDERS.

DENMAN C.J. I should have thought it sufficient if the justice actually had six days' notice; but as the rest of the Court is of a different opinion, the rule must be discharged.

Rule discharged.

The KING *against* MARGARET JOLLIE and
JAMES STEEL(a).

BY a rule of last *Hilary* term, *January 21st*, granted on the affidavit of the Earl of *Lonsdale* and others, the defendants were called upon to shew cause on the 30th, why a criminal information should not be exhibited against them for printing and publishing certain libels. The libels were contained in a newspaper called *The Carlisle Journal* (published in that city) of the 23d of *June*, 29th of *September*, and 20th and 27th of *October*, 1832, and went into much detail upon transactions extending over a great length of time. The Earl, in his affidavit, sworn on the 18th of *January* 1833, contradicted the charges in a circumstantial manner, and in conclusion stated, "That he did not see, nor had he any knowledge of the matters contained in the said

A motion for a criminal information against a person who is not charged as a magistrate or public officer, may be made later than the second term after the alleged offence, if it be shewn that the prosecutor did not know of the fact in time to make an earlier application.

4 Bac. 1018.

(a) This case was decided *May 4th*.

several

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—
The King
against
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several statements before set forth, until this month of *January*." The defendant *Steel*, in an affidavit sworn on the 26th of *January*, stated that the affidavits and copies of the affidavits were not served upon and *Margaret Jollie* till the 24th of that month, so that he could not peruse and answer the affidavits at the time assigned by the rule for shewing cause. He also made some allegations tending to call in question the fact that the Earl had not known of the libel at that month. The rule was enlarged to this term.

Aglionby, in the course of the term, shewed cause. The application came too late. A rule for a writ of *habeas corpus* cannot be moved for later than the next term after the imputed offence, and that only where assize has intervened; and there must be time for the defendant to shew cause within the term. *Res v. Bland and Peters (a)*, *Res v. Morice and Others (b)*, *Marshall and Grantham (c)*. Here a quarter had intervened, and there was not time to shew cause within the term. It is no excuse for applying at a proper time, that the prosecutor did not know of the libel sooner. *Res v. Bishop (d)*.

F. Pollock contra. In the cases cited the defendants were all against magistrates, who are entitled to special protection in the discharge of their duties. There is nothing in common between such cases and that of an individual publishing a newspaper for his own private purposes.

(a) 13 *East*, 270.(c) *Ibid.* 522.(b) *Ibid.* 271. note (a).(d) 5 *B. & A.* 612.

DENMAN C. J. I think, under the circumstances stated by the prosecutor, the application comes in sufficient time.

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against
JOLLIE.

LITTLEDALE J. I also think that in this case the time to be allowed for moving must be reckoned from the prosecutor's knowledge of the libel: though if that had been otherwise, I should not have thought the application made early enough in the present term to give the defendant an opportunity of answering in the course of the term. The rule must be absolute.

PARKE J. concurred.

Rule absolute (a).

(a) The general rule, as affecting prosecutors of criminal informations, is to be found in *Res v. Robinson* (1 Sir W. B. 542.), where Lord Mansfield says, that, as to the time of application, "there is no precise number of weeks, months, or years; but, if delayed, the delay must be reasonably accounted for." An exception seems to be now well established in the case of magistrates, against whom the motion must be made early enough in the second term (no assize having intervened, according to *Res v. Harries*, 13 East, 270.) to allow of their shewing cause during the term. And this, in the following case, was extended to other public officers.

REX v. HARTLEY and Others.

IN Michaelmas term 1825 (Nov. 25.), *Scarlett* moved for a rule nisi for a criminal information against certain commissioners of paving in *Southwark*, for corrupt exercise of authority, and misappropriation of funds. The objection was, that the matter complained of took place in June 1824; but it had only been disclosed by an investigation of the parishioners, principally in May last. *Res v. Marshall* (13 East 322.), was mentioned to the Court; but *Scarlett* said that the parties here were not justices, and, though public commissioners, they were self-elected, and it was a place of advantage. The Court thought that public officers were entitled to the same protection as magistrates, and that the principle of the rule was the same; they therefore said *Scarlett* should take nothing by his rule then, but might mention it again the first day of the next term if he thought right. The case was not again mentioned. MS. of Mr. Robinson of the Crown Office.

In *Res v. Barry O'Meara*, the prosecutor, Sir Hudson Lowe, on the
11th

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The KING
against
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11th of *February* 1823 (the last day but one of the term), obtained a *nisi* for a criminal information against the defendant, for libels in a work called *Napoleon in Exile*. The prosecutor's affidavits stated, that the first edition of the work was published in *August* preceding, and a second in a subsequent *November*. It was not mentioned when the prosecutor (who had been abroad) returned to *England*, or when the libel came to his knowledge. On cause being shewn, the Court held that the application came too late, and discharged the rule.

It appears from *Rex v. Bishop* (5 B. & A. 612.), that, even in an action against a magistrate, the prosecutor cannot excuse delay by merely alleging that the facts have but lately come to his knowledge. *Att. Gen. v. Hartley* (*supra*), seems to extend this to other public officers.

Wednesday,
May 8th.

GEORGE MOORE, Gent., One, &c. against
TERRELL and Others.

9th & 10th 1833

In an action for a libel, charging an attorney with "disgraceful conduct" in having, at an election, disclosed confidential communications which he had acquired professionally, the defendant pleaded that the plaintiff had, on that occasion, disclosed details professionally and confidentially made

known to him, relating to three transactions (which were specified); two of them being instances in which he had been employed by mortgagors to manage mortgages, and in the third, where, in his employment as attorney, he had become acquainted with the nature of the client's title, and his right to grant freehold leases. At the trial, it appeared, from the mortgages, that the plaintiff had acted as attorney both for the mortgagors and mortgagees.

Held, that the question for the jury was, whether the matters disclosed by the plaintiff were confidential communications acquired by him professionally, and not whether they were such as he would not be compellable to disclose, if called as a witness in a criminal justice.

It seems, that the knowledge acquired by the plaintiff as to the right of his client to grant freehold leases, was of that privileged nature that he would not have been bound to disclose it if called on as a witness.

3 B. & A. 207.

DECLARATION stated that there had been a commission of a knight of the shire to serve in parliament for *Dorset*, on which occasion Lord *Ashley* and the Honourable *W. F. S. Ponsonby* were candidates, and the plaintiff was retained by and acted as attorney on behalf of Lord *Ashley*, during the examination of voters; and that the defendants contriving, &c., and to cause it to be believed that the plaintiff, as such attorney, was unworthy of confidence, and that he was a person who, as such attorney, had illegally, dishonestly, treacherously, and dishonestly disclosed communications which he had ac-

professionally, and that he was a person to whom it would be dangerous to make any confidential communication as such attorney, wrongfully and maliciously published in a newspaper called the *Western Times*, a false, malicious, and defamatory libel, of and concerning the said election, and of and concerning the plaintiff, and of and concerning him in the way of and in respect of his profession as such attorney as aforesaid, containing the libellous matter following:—“*Blandford*. We are sorry to find that the town of *Blandford* has, since the election, become the scene of violent outrage. Mr. *S. Smith* and Mr. *Moore* (meaning the plaintiff), two attornies, advocates for Lord *Ashley*, had, during the examination of the voters, disclosed many confidential communications which they had acquired professionally. The townsmen, justly annoyed at such conduct, have broken into their offices, taken all their papers, and scattered them about the streets of *Blandford*. This is the more to be lamented, as Mr. *Smith*, we understand, was one of the registrars of the diocese, and we fear the wills intrusted to his care have shared a similar fate with his private papers. Nothing can be more disgraceful than such conduct as was pursued by those attornies” (meaning to include the plaintiff) “at the election, but we regret that it should have entailed such serious consequences as we have related.”

Plea, that before the publishing of the libel, and before the said election, *W. Ball* and *John Ball* had borrowed a sum of money of the *Blandford* Bank, upon mortgage of certain property in which they were jointly interested, and had, upon that occasion, employed the plaintiff, then being an attorney, to conduct and negotiate the said mortgage on their behalf, and that

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that he had conducted and negotiated such matters for them, and had received, in the course of his employment, divers professional and confidential communications touching the affairs and property of said *W. B.* and *J. B.*, and especially touching the mortgage and the sum borrowed thereon, the value of the said mortgaged premises, and the conduct of *W. B.* and *J. B.*, before the publishing of the supposed libellous matter, and at the election, came to the poll as voters, and tendered their votes respectively for *W. F. S. Ponsonby*, one of the candidates at the election, and were examined in the presence and hearing of the plaintiff touching their said votes; and thereupon the plaintiff, acting as attorney on behalf of Lord *Albany* during the examination of voters, and being one of the advocates, did, without the permission of *W. B.* and *J. B.*, and during such their examination, disclose and declare all that was known to one *J. H. Terrell*, and to other persons present, and hearing the same, the said mortgagee, did, without the permission of *W. B.* and *J. B.*, disclose and declare the amount of the principal money of the said mortgaged property, and the amount of the monies borrowed thereon, and declared also at the hearing of the same persons, that the interest money so borrowed as aforesaid was as much as the rent payable in respect of the said property, whereas in truth, there was a considerable surplus accruing from the said rent, over and above, and after, the payment of the said interest. The plea stated another action, similar to the first, in which the plaintiff

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employed to conduct and manage a mortgage of one *Nippard*, and that, upon his tendering his vote, the plaintiff made a similar disclosure as to the amount of the money borrowed, and the interest, &c. The plea also stated, that, before the publishing of the supposed libellous matter, and before the said election, the plaintiff, then being an attorney, had been professionally employed by Sir *J. W. Smith* in the management of his affairs and business, and in the course of such employment had become professionally and confidentially acquainted with the title of the said Sir *J. W. Smith* to certain property in the county of *Dorset*, and to the exercise and enjoyment of certain rights and powers respecting the same, and especially to the exercise of a power to grant a freehold lease of part thereof, and which power had been exercised by the said Sir *J. W. Smith* before the said election, by granting a freehold lease of part of the said property to one *J. Coward*; and the said *J. Coward*, before the publishing of the supposed libellous matters, and at the said election, came up to poll as a voter, and tendered his vote for the said *F. W. S. Ponsonby*, and was examined in the presence and hearing of the plaintiff touching his said vote; and that the plaintiff, acting as attorney for Lord *Ashley*, without the permission of either the said *J. Coward* or the said Sir *J. W. Smith*, and during such examination of *Coward*, disclosed and made known to *J. H. Terrell* and other persons, then present and hearing the same, divers details and particulars touching the title of the said freehold lease, and touching the right of the said Sir *J. W. Smith* to grant the same, which said details and particulars had been so professionally and confidentially made known to the plaintiff as aforesaid. The plea

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 against
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further stated, that the plaintiff, for the purpose of delaying the election, and harassing *Ponsonby's* took frivolous and unfounded objections to the persons who tendered their votes for *Ponsonby*, insulted the voters, and conducted himself in a disgusting manner; that divers of the townsmen of *Blandford* were justly annoyed at the disclosure of the confidential communications, and were thereby induced to enter into the office of the plaintiff, and take his papers and scatter them about the streets of *Blandford*, and the town became the scene of violent outrage, &c., which the defendants did compose and publish, &c., in a lawfully might.

At the trial before *Park J.*, at the *Dorset* assizes, 1832, evidence was given by the defendants in the three instances in which the plea charged the plaintiff with having improperly availed himself of the knowledge obtained by him as an attorney, to prevent the parties from voting. In the two cases of the mortgages, it appeared that no other attorney than the plaintiff had been employed, and that he acted as mortgagor and mortgagee. As to *Coward's* case it was stated that he tendered his vote in right of a freehold lease granted to him by *Sir J. W. Smith* in 1828, and that the plaintiff said he (plaintiff) was the attorney of *Sir J. W. Smith*, and that the latter had no authority at that time to grant such a lease. Some evidence was also given of the alleged frivolous objections. The facts in dispute at the trial was, whether the outrages were committed against the plaintiff's party by inhabitants of the town, or by strangers. There was some, but not very explicit evidence on the subject, but the question was not distinctly submitted.

the jury. The jury found a verdict for the plaintiff, damages 100*l*. In *Easter* term following, a rule nisi was obtained for a new trial, on the ground that the learned Judge, in his address to the jury, had too much narrowed the sense of the words “*professional and confidential communications*” employed in the plea, and that he had treated them as synonymous with those privileged disclosures, which an attorney, if called upon as a witness in Court, would not be compellable to reveal.

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MOORE
against
TERRELL.

Coleridge Serjt. and *Barstow* shewed cause in this term. The defendants failed in proving the justification. The misconduct of the plaintiff, and the annoyance and consequent outrage of the townsmen of *Blandford*, are connected together by the libel. It was therefore incumbent on the defendants to prove that the outrage was committed by those townsmen, but there was no such proof. The cases put in the plea are certainly not instances of privileged communications. As to *Coward's* case, the relation of attorney and client never existed between him and the plaintiff. The allegation by the latter that Sir *J. W. Smith* had no power to grant the lease in 1829, if any breach of confidence, was so only in respect of Sir *J. W. Smith*. As to the mortgages, it was proved that the plaintiff acted as the attorney of both parties, and it never could have been intended that he should not disclose to the mortgagee any defect of title in the mortgagor. The rule as to privileged communications (which the attorney when a witness is not compellable to disclose) is not confined to communications made in the course of, or with a view to a cause, *Cromacke v. Heathcote* (a), *Hughes v. Biddulph* (b),

(a) 2 B. & B. 4.

(b) 4 Russ. 190.

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Doe v. Harris (a), *Clark v. Clark* (b). [*Denm*

The question upon this record is not whether communications were so privileged that the pl called upon as a witness would not be bound to them, but whether they were confidentially made in his professional character, so as to render it dis for him to reveal them. *Parke J.* In *Green Gaskell* the Lord Chancellor consulted with *Tina Lord Lyndhurst*, and myself, and we all thou client's privilege extended much beyond commu in respect of a suit. (c)] The defendants were t

(a) 5 C. & P. 592.

(b) 2 M. & M. 3.

(c) In *Bolton v. The Corporation of Liverpool* (*Mytne & Keen* a bill of discovery in aid of the defence to an action brought l poration for the recovery of town dues, the defendants, by the admitted that they had in their custody, and relating to the me tioned in the bill, divers cases which had been prepared and l counsel in contemplation of the then pending litigation, as a grants and deeds, which were the title deeds and documents their title to the dues in question, Lord Chancellor *Brough* that the plaintiffs in equity were not entitled to an inspectio cases or deeds. And in *Greenough v. Gaskell* (M. & K. 98.), which sought to charge a solicitor with a fraud on the plaint course of transactions in which he had been engaged for his same noble Lord refused to order the production of entries a randums contained in the defendant's books, or of written co tions made or received by him, relating to those transact admitted by the answer to be in the defendant's custody. In on a full review of the authorities, the Lord Chancellor lai generally that attorneys or solicitors cannot be compelled a "matters committed to them in their professional capacity, a but for their employment as professional men, they would no come possessed of."—"As regards them," his Lordship said, not appear that the protection is qualified by any reference to p pending or in contemplation. If, touching matters that come ordinary scope of professional employment, they receive a comm in their professional capacity, either from a client, or on his acc for his benefit in the transaction of his business, or, which amoa same thing, if they commit to paper, in the course of their en on his behalf, matters which they know only through their p relation to the client, they are not only justified in withholding

make out not only that there was a breach of confidence by the plaintiff, but that it took place under circumstances disgraceful to him, and of that there is no evidence.

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against
TERRELL.

Crowder contra. The learned Judge, at the trial, seemed to think it necessary for the defendants to make out that the matters disclosed by the plaintiff were such as he would have been privileged to decline stating as a witness. But, independently of this objection, the question raised by the record was (and that was for the jury), whether the matters so disclosed by him, had been communicated in professional confidence, so as to make it disgraceful in him to disclose it. There are cases where physicians, surgeons, and divines are bound to disclose the secrets which have been imparted to them in the practice of their profession, when called upon to do so in courts of justice, but surely it would be most disgraceful for such persons to do so on other occasions. The communications so made to such persons, though not privileged, are confidential. In *Rex v. Upper Boddington (a)*, *Bayley J.* seemed even to consider that a knowledge of the contents of mortgage deeds, acquired by an attorney in the course of his employment by the mortgagee, was privileged from disclosure; but whether it be so or not, the matter communicated to

ters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness. If this protection were confined to cases where proceedings had commenced, the rule would exclude the most confidential, and it may be the most important, of all communications; — those made with a view of being prepared either for instituting or defending a suit, up to the instant that the process of the Court issued."

(a) 8 D. & R. 732.

1833.

 MOORE
 against
 TENNELL.

the attorney of a mortgage
 cation which it is disgraceful

DENMAN C. J. now deli
 Court. And, after stating
 follows : —

A rule for a new trial
 that the learned Judge, in so
 too much narrowed the se
 sional and confidential comm
 plea; and that he had treat
 privileged disclosures, whic
 witness in Court, would no
 The whole class of cases o
 Lord *Tenterden's* doctrine
 cited. It was argued, in sup
 terion so applied was impro
 might incur just censure by
 facts professionally brought
 yet he would be bound to s
 a judicial proceeding.

One of the instances of
 statement (derived from the
 client's title), that such clien
 lease for life, in respect of
 This knowledge would fall,
 privileged communications
 the libel alleged that many
 by the plaintiff. The only
 which he had become infor

but not exclusively as an attorney acting for a client. He had been concerned on both sides in two mortgage transactions; and acting as agent at the election, he objected to the votes of the mortgagors, in particular on the ground that their property was mortgaged, which the voters did not dispute, but established their votes, by shewing the sufficiency of their property above the mortgage money.

We think, however, that the opinion of the jury ought to have been taken, whether these were or were not confidential communications acquired professionally in the more enlarged and popular seuse of the word. And though it was contended, in support of the verdict, that the proof of the justification failed, because, even if they bore that character, the disclosure of them could not be said to have justly annoyed the plaintiff's townsmen, or be called disgraceful (which, indeed, the amount of damages may seem to prove to have been the opinion of the jury), we are of opinion that the question should have been submitted to them, whether the fact was proved, and whether, if it were proved, the inference was correctly drawn. Another disputed fact on the trial was, whether the outrages were committed against the plaintiff's property by inhabitants of the town, or by strangers. This was, doubtless, an essential part of the plea, and ought to have been proved; but there was some evidence proper to be submitted to the jury, and their verdict was not separately taken on this point. Unless, therefore, the defendant should feel that some reparation is due from him, and should offer such as the plaintiff may deem it prudent to accept, a new trial must be had.

Rule absolute.

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MOORE
against
TERRELL.

1838.

Wednesday,
May 8th.DOE dem. JAMES DEARDEN and Others
v. JOHN MADEN.

R. L. granted by deed to the abbot and monks of S., the pasture called *Brandwood* to feed their animals, and that the grantees should have in that pasture 100 cows. By deed of the 25 Edw. 3., reciting the former grant, *Henry, Duke of Lancaster*, the then owner of the fee, released to the abbot and monks and their successors for ever, all the right and claim which belonged to him and his heirs by any title in the pasture aforesaid, and that it might be lawful for the abbot and convent, and their successors, to inclose the said pasture, and to reduce it to cultivation, or to make any other profit

thereof at their free will, without contradiction or impediment, saving to the grantor and his heirs their right to hunt. On ejectment brought to recover the lands, as part of the waste of a manor belonging to the duchy of *Lancaster*, the above deeds were produced, and it appeared that, as far back as living memory went, rights of ownership, inconsistent with the alleged title in respect of the duchy, had been exercised over the lands; and they had been inclosed sixteen years: Held, that the abbot and monks were to be presumed to have been in possession at the time of the second deed, and that it operated as a conveyance by way of release, though there were not words to make it operate as a feoffment with warranty.

6 Bac. 619.

EJECTMENT to recover a parcel of land, which had been inclosed from an open common called *Hill* and *Reaps Moss*, in the parish of *Rochdale*. The trial before *Gurney B.*, at the *Lancaster Spring Assizes* 1838, it appeared that *Mr. Dearden*, as lord of the manor of *Rochdale*, claimed the locus in quo, which was situated on *Tooter Hill* and *Reaps Moss*, in *Brandwood* (a hamlet or district in the township of *Spotland* in the parish of *Rochdale*), as part of the wastes of the manor; that, in the reign of *Queen Elizabeth*, the manor belonged to the crown in right of the duchy of *Lancaster*, and she, in the twenty-seventh year of her reign, granted a lease of the manor for a term of years which expired in the reign of *James the First*, *John Byron*, knight. *Charles* the First, in 1625, conveyed the manor of *Rochdale* to *Edward Ramsay* and *John Ramsay* in fee. They conveyed to *Sir Robert Ramsay* in fee, and he, in the 13 *Car. 1.*, conveyed to *Sir John Byron* of *Newstead*, knight, in fee, from whom it descended to the late *Lord Byron*, and in 1828 conveyed by *Sir J. Cam Hobhouse* and others, under his will, to *Mr. Dearden*. Grants, by the family, of parcels of *Brandwood*, to hold by court roll, to various persons, and particularly

grandson of *Thomas Holt* after mentioned, were produced; and acts of ownership in *Brandwood* were shewn to have been exercised by the poundkeepers and moor-lookers of the lords of the manor of *Rochdale*. It was further proved that *Brandwood* was within the parish of *Rochdale*, and that the manor and parish of *Rochdale* were considered to be co-extensive.

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DOR dem.
DEARDEN
against
MADEN.

The defendant's case was, that, long before Sir *John Byron* had any right under the duchy lease, *Brandwood* had been severed from the manor of *Rochdale*; and, to prove this, he gave in evidence the following grant by *Roger de Lacy* to the abbot and monks of *Standlawe*, who afterwards removed to *Whalley*: — “ Know all men, as well present as future, that I, *Roger de Lacy*, constable of *Chester*, have given and granted, and by this my present charter have confirmed, to God and the Blessed *Mary*, and to my abbot and monks of the *Benedictine* place of *Standlawe*, four oxgangs of land in *Rochdale*, in the township which is called *Castleton*, with all their appurtenances, with common of the whole township of *Rochdale*, free and discharged from all service, exaction, and custom belonging to me or my heirs for ever. Also I have given to them in my forest that pasture which is called *Brendewood*, to feed their animals, by the divisions under mentioned, to wit, from *Gorsichelache* to *Cuhopheved*, &c. (setting out the bounds): Also the aforesaid monks shall have in that pasture 100 cows, with the offspring of two years; and if I shall have cattle there, their cattle shall feed and go far and wide wheresoever mine feed and go. And I forbid any of my bailiffs or servants to offer to my said monks, or their men, any trouble or grievance, or by injuring their animals to unjustly distress them. And I and my heirs will

1833.

—
 DON dem.
 DEARDEN
 against
 MARR.

will faithfully warrant this gift to my aforesaid against all men." Then follow the names of witnesses. In a suit (17 Ed. 3.), before the Jus Eyre in *Lancaster*, between the abbot of *Whalley* the forester of the forest of *Penhull*, who had the right of puture in *Brandwood*, the jury found (appeared by the record) that, in the reign of King *Roger de Lacy*, by the deed already set out, gave *Brandwood* to the then abbot of *Stanlawe*, under which abbot was seised, and that, in the time of King the Third, the abbot first built houses in *Brandwood* and brought a great part of it into cultivation.

The defendant also gave in evidence the following deed:—

"To all to whom this present writing indent come, *Henry Earl of Lancaster, Derby, Leicestershire, Lincoln, Steward of England*, greeting: Know that whereas the Lord *Roger de Lacy, Constable of Chester*, of good memory, and our predecessor lordship of *Blackburnshire* and of *Rachedal*, had given and granted by his deed, which we have among other things, to God and the Blessed Mary to the abbot and monks of the *Benedictine monastery of Stanlawe*, the predecessors of the abbot and convent of *Whalley*, that pasture which is called *Brandwood* forest by the divisions under mentioned, that is from *Gorsilache*, &c. (setting out the bounds as free and discharged from all secular service, customs and exaction, We, *Henry*, the aforesaid earl, of our knowledge and our special favour, approve, ratify as much as in us lies, confirm the aforesaid gift and grant. We willing, moreover, on account of devotion which we have to the mother of God

Glorious Virgin, and the special affection which we bear to the person of brother *John de Lindelaye*, abbot of the said house of *Whalley*, Doctor of Divinity, to do the said abbot and convent and their successors the greater favour in this behalf, have remised, released, and altogether have quit claimed for us and our heirs to the said abbot and convent of *Whalley*, and their successors for ever, all the right and claim which can belong to us or our heirs by any title whatsoever, within the pasture aforesaid, so that henceforth the said abbot and convent may have and hold the said pasture in severalty exonerated, freed and discharged, as well from puture of the foresters of us and our heirs, as from agistments, or any putting of the cattle on the pasture aforesaid, by us or our heirs, or the servants of us or our heirs, and from all other services, exactions, and demands whatsoever. And that it may be lawful for the said abbot and convent, and their successors, to inclose the said pasture, and to reduce it to cultivation, or to make any other profit thereof at their free will, without contradiction or impediment of us or our heirs, saving to us and our heirs in the aforesaid pasture our right to hunt without injury or troubling the said abbot and convent, or their successors and servants. We also have released to the said abbot and convent of *Whalley*, and their successors, all the right and claim which we could in any manner have in forty acres of waste in *Blackburn*, and seven acres of waste in *Castleton*, which said forty-seven acres of waste were lately approved by the said abbot and convent in the township aforesaid; so that neither we nor our heirs can hereafter require or claim by any title or pretext in the aforesaid wastes so approved any right
or

1833.

DOE dem.
DEARDEN
against
MADEN.

1833.

Doz dem.
DEARDEN
against
MADEN.

or claim, but thereof we will by these presents altogether excluded. And we the said *Henry*, the said earl, and our heirs, will warrant, acquit, ever defend all the aforesaid pasture and waste as aforesaid to the said abbot and convent, and successors, in form aforesaid, against all people witness whereof, &c. Given at our manor house *Savoy*, near *London*, the 20th day of *February*, twenty-fifth year of the reign of King *Edw Third*," &c.

The defendant also produced in evidence a grant by King *Henry* the Eighth, in the thirty-third year of his reign, to *Thomas Holt* of *Gristlehurst*, in fee, the manor of *Spotland* within the parish of *Rochdale*, with all those messuages, lands, tenements, meadows, woods, pastures, woods, and underwoods, &c. lying within the parish of *Rochdale*, which manor and premises lately belonged to the late monastery of *Wharfedale*, and came to the crown by reason of the attainder of *John Paslowe*, the last abbot of the same, who was attainted of high treason. The defendant further stated that the above mentioned premises passed from the family of *Holt* about the time of *Charles* the Second: that the occupiers of three ancient tenements, *Roccliffe*, and *Tonge*, and *Greave*, had exclusively used the waste land on *Tooter Hill* and *Reaps Moss*, and had sold turf for sale on the *Moss* beyond the time of memory; that they in 1812 agreed to divide the waste land in question, and subsequently about fourteen years ago, inclosed the whole and that the defendant was possessed of a portion of this inclosure.

The learned Judge told the jury that the second deed given in evidence operated not merely as a confirmation of the grant of pasture, but also as a grant of the soil, subject to a right of chase, and consequently that *Tooter Hill* and *Reaps Moss*, which were part of *Brandwood*, were thereby severed from the manor of *Rochdale*: that on the attainder of the abbot of *Whalley*, when the lands revested in the crown, they did not reunite with the duchy of *Lancaster*, because they vested in the king in right of his crown, and not of the duchy (*a*), and that the circumstance of *Holt's* descendant having accepted a grant from the *Byrons* might have arisen merely from a distrust of his ancestor's title, and a persuasion that Queen *Elizabeth* had granted *Brandwood* to the *Byrons* in granting to them the duchy manor of *Rochdale*. The jury found for the defendant.

1833.

DOR dem.
DEARDEN
against
MADEN.

F. Pollock, on a former day in this term, moved for a new trial, on the ground that the learned Judge had misdirected the jury as to the legal effect of the deeds. He contended that the first deed clearly passed only a right of common of pasture, and the second was a confirmation only of the right granted by the first. It undoubtedly gave a licence to inclose the land, but it did not pass the soil.

Cur. adv. vult.

DENMAN C. J. now delivered the judgment of the Court.

In this case, a motion for a rule nisi was made by Mr. *Pollock*, on the ground that the learned Judge mis-

(a) See 1 *Bla. Comm.* 119.

directed

1883.

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 DOR DEM.
 DEARDEN
 against
 MADEN.

directed the jury, with respect to the legal effect of instruments,—one, a deed of *Roger de Lacy* abbot and monks of *Stanlawe*; the other, of the *Lancaster* to the abbot and convent of *Whalley*.

urged, that neither of the deeds could operate to convey the soil of the pasture of *Brandwood*, and the learned Judge was wrong in directing the jury that they could. The first is in ambiguous terms. If it had been confined to a grant of that pasture which is *Brandwood*, it would have conveyed the soil, but the context seems to confine the grant to that of a right of common only.

The second instrument is in less ambiguous terms. We think it was clearly the intention of the grant to pass a separate interest in the soil, and not a mere right of common; but there are no words to make the deed operate as a feoffment with livery of seisin. There is, however, no difficulty in presuming that the abbot and convent were in possession at the time of the grant, which would make it operate as a conveyance by way of release; and we think it ought to be done in favor of the possession in modern times, the land having been actually enclosed for sixteen years, and proved by contradicted evidence to have been exclusively pastured upon by the owners of three estates, as far back as living memory went. We think, therefore, that there should be no rule.

Rule refused

(a) For a full historical account of the religious foundation of *Stanlawe* translated afterwards to *Whalley*, see *Whitaker's History of Wharfedale* book ii. chap. ii.

1894.

Note to the case of *Howard v. Bartolozzi*, antè, p. 555.

The following case was argued and determined in the Court of Exchequer, in *Hilary* term 1834.

TABRAM, Gent., One, &c. *against* FREEMAN.

A RULE had been obtained, calling upon the plaintiff to shew cause why the cognovit, and judgment, and execution thereon, should not be set aside with costs. It appeared upon the affidavits, that the defendant was indebted to the plaintiff, and being about to take the benefit of the Insolvent Debtors' Act, employed the plaintiff, an attorney of the Insolvent Court, to procure and conduct his discharge; but it was agreed between them, that the plaintiff's debt should not be inserted in the schedule, and that a cognovit which had been given to secure it, should be suspended until after the defendant's discharge, and then revived. About two years afterwards, the plaintiff entered up judgment on the cognovit, and issued execution. The present rule was moved for on the ground that the agreement was a fraud upon the Insolvent Debtors' Court, upon the creditors of the insolvent, and upon the policy of the law.

Follett shewed cause. As to the agreement being a fraud upon the Court, no creditor being bound to come in, the Court could not be deceived by the omission of any particular debt. It is no fraud upon the creditors at large, because they have in fact each a greater present share of the insolvent's effects, than if another creditor had been added to their number. Nor is it a fraud upon the law, for the reasons given in *Howard v. Bartolozzi* (4 B. & Ad. 555.).

Kelly in support of the rule. Such an agreement as this is a fraud upon the Court, the creditors, and the law. It is a direct agreement between the insolvent and his attorney, that the former shall forswear himself, and impose upon the Court; for by the Insolvent Debtors' Act, 7 G. 4. c. 57. s. 40. the debtor is to deliver in upon oath a true and correct account of *all* his debts. He swears falsely if he omit any debt in his schedule. The creditors are also defrauded, for by the fifty-seventh section the assignee may obtain a judgment and issue execution against the insolvent's after acquired effects. If any single creditor can by agreement with the debtor withhold his debt, and immediately after the discharge sue for it and obtain a judgment, he may gain a priority of execution, and seize the whole after-acquired effects, to the prejudice of the other creditors. So it is a clear fraud upon the policy of the law, which

An agreement by an insolvent about to take the benefit of the act, with his creditor, that the claim of the latter should be omitted in the schedule, and that a cognovit which he held shall be suspended, and revived after the debtor's discharge, was held by the Court of Exchequer to be fraudulent, and the cognovit and judgment signed, and execution issued thereupon after the discharge, were set aside with costs.

con-

1884.

TANHAM
against
FREEMAN.

contemplated the effectual and complete discharge of the person debtor, and the application of all his effects, present and future, to the fair and proportionate satisfaction of his debts. *Howard v. J* (4 B. & Ad. 555.) was decided upon too limited a view of the Insolvency Act.

Per Curiam (Bayley, Vaughan, Bolland, and Gurney Be.). The plaintiff cannot be permitted to stand. The plaintiff, by agreeing to the schedule, omitting his own debt, shall be delivered in under the agreement that the defendant shall deceive the Court by a wilfully false statement upon oath, contrary to sections 40. and 71. of the Insolvent Act. This alone would avoid the agreement. But the creditors are imposed upon. They have a right to believe that the debtor is honest, and that by his future exertions he may procure the means of satisfying himself, and of satisfying their just claims. How can he do this if his person and his property are liable to an execution, whenever he is discharged, the plaintiff finds it advantageous to come upon him. The true scope and object of the statute appear to have been but considered in the case of *Howard v. Bartoloni*. The intent of the statute was, that insolvents should lay before their creditors a true and fair statement of their affairs; that where they have been guilty of no misconduct, their persons should be discharged, and their debts divided among their creditors; and that when discharged, they should be unincumbered with prior obligations, and free to seek their livelihood subject to the right of the creditors to their future surplus property. These objects might be defeated, if agreements like the present were supported in law. The rule for setting aside the cognovit and subsequent proceedings, must be absolute with costs; and if the plaintiff is advised to try the correctness of our present decision before a high court, he may do so by prosecuting his action, and raising the question on the record.

Rule as

(Ex relatione Kelly.)

END OF EASTER TERM.

AN
INDEX
TO THE
PRINCIPAL MATTERS.

ACCIDENTAL FIRE.

See PAWNBROKER.

ACTION.

See MANDAMUS, 2. PRACTICE, 4.

ACTION ON THE CASE.

See MARKET, 1. PLEADING, 3, 4.

1. A reversioner cannot maintain an action on the case against a stranger, for merely entering upon his land held by a tenant on lease, though the entry be made in exercise of an alleged right of way, such an act during the tenancy not being necessarily injurious to the reversion. *Baxter v. Taylor*, M. 3 W. 4. Page 72
2. Plaintiff declared in case, that the defendants wrongfully and maliciously took his goods, of the value of 700*l.*, as a distress for 14*l.* *alleged and pretended to be due* for a poor rate, whereby they levied an *unreasonable and excessive* distress for the said 14*l.*; and it was proved that the defendants, overseers, having a regular distress

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warrant for the rate, distrained cattle, &c. of the plaintiff, to the value of more than 600*l.* :

Held, that the plaintiff was not bound to demand a copy of the warrant, pursuant to the 24 G. 2. c. 44. s. 6., before commencing his action, as the overseers had not acted in obedience to the warrant, and no action would have lain against the justices.

Held, further, that it was not a question to be left to the jury, on these facts, whether or not the defendants acted maliciously.

And, on motion in arrest of judgment, held that the declaration, though it did not expressly admit *any* poor rate to have been due, (on which ground it was objected that the action ought to have been trespass,) was sufficient, at least, after verdict. *Sturck v. Clarke and two Others*, M. 3 W. 4.

Page 113

3. Declaration stated, that plaintiff, being the inventor and manufacturer of metallic hones, used certain envelopes for the same, denoting them to be his; and that defendants wrongfully made other hones, wrapped them in envelopes resembling the plaintiff's, and sold

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them as his own, whereby the plaintiff was prevented from selling many of his bones, and they were depreciated in value and reputation, those of the defendants being inferior:

Held, that the plaintiff was entitled to some damages for the invasion of his right by the fraud of the defendants, though he did not prove that their bones were inferior, or that he had sustained any specific damage. *Blofield v. Payne*, H. 3 W. 4. Page 410

4. After distress made by a broker, in a case within 57 G. 3. c. 93., the rent and charges may still be tendered to the landlord.

Declaration contained six counts in case; the seventh charged, that the defendants took and distrained the goods of the plaintiff for rent, of more than sufficient value to satisfy the rent and costs, and then voluntarily abandoned the same; and afterwards wrongfully, injuriously, and vexatiously again took and distrained the same goods for the same rent, and refused to return the same, and converted them to their own use: Held, on motion in arrest of judgment for misjoinder of case and trespass, that although this second taking of the goods was a trespass, yet the plaintiff might bring case for the conversion, and that the count was an informal one in case, and sufficient after verdict. *Smith v. Goodwin*, H. 3 W. 4. 413

5. The words, "He robbed J. W.," are actionable, as imputing an offence punishable by law. If they were used in any other sense, the defendant must shew it. Per *Denman C. J.*, and *Parke J.*, *Littledale J.* dubitante. *Tomlinson, Gent., One, &c. v. Brittlebank*, E. 3 W. 4. 630

ADMISSION.

See EVIDENCE, 5.

ANNUITY.

ADVERTIZEMENT

See ASSUMPSIT, 5.

AFFIDAVITS.

See ARREST, 2. JUDGMENT.
MAN. MANDAMUS, 5.

AGREEMENT.

See STAMP.

AMENDMENT.

See APPEAL, 3. PLEADING
POOR RATE, 3. PRACTICE

ANNUITY.

See WARRANT OF ATTORNEY

1. By statute 1 & 2 G. 4. c. incorporating a gas light company it was enacted that the directors should have the custody of the common seal, and power to do for the affairs and concerns of the company, who were themselves by another clause, empowered to make orders under seal at meetings for the government of the company, and for regulating the proceedings of the directors. No power was expressly given by the act to grant annuities. At a special general meeting of the company, a committee previously appointed for certain purposes reported that it was expected that the then clerk, whose health was bad, should be invited to retire upon a pension, on condition of abstaining from acts prejudicial to the company; that such a proposal had been made to him, that he had accepted it. The meeting voted, that the pension should be received and entered in the minutes, and that the directors should carry into effect the committee's recommendation.

order to this effect was made under seal. The directors, by deed, in the name of the company, granted an annuity to the clerk on his retirement, subject to conditions of the nature above stated, and they put the corporate seal to it: Held, that the seal was properly affixed by the directors; that the granting of such annuity was warranted by the statute; that it was a concern of the company, within the first-mentioned clause; and that no order of the company under seal was necessary to authorize it. *Clarke v. The Imperial Gas Light and Coke Company*, 3 W. 4. Page 315

2. A rector, after the statute 13 Eliz. c. 20. had been repealed, and before its revival by 57 G. 3. c. 99., demised his rectory to a trustee for ninety-nine years to secure an annuity. After the passing of 57 G. 3. c. 99., by deed reciting the grant of the former annuity, and that A. had agreed to purchase of the grantor an annuity of 574*l.* a year for 4400*l.*, and out of that sum to pay off the former annuity, and that that annuity, and the term created to secure the same, should be assigned to a trustee for A.'s benefit, the rector granted the said annuity of 574*l.* chargeable on his rectory, and the trustee of the term created to secure the annuity of 1813, assigned it to a trustee for the benefit of A.:

Held, that inasmuch as the term was created after the passing of the 43 G. 3. c. 84., which repealed the 13 Eliz. c. 20., the assignment of it, though for the purpose of securing the payment of an annuity charged on the benefice after the passing of the 57 G. 3. c. 99., was valid. *Doe dem. Wilks and Others v. Ramsden, Clerk*, E. 3 W. 4. 608

APOTHECARY.

1. A person authorized to practise as a physician, by diploma from a Scotch University, is not thereby exempted from the penalty imposed by 55 G. 3. c. 194. s. 20., for practising as an apothecary in *England or Wales*, without the certificate required by that act. *Apothecaries' Company v. Collins*, E. 3 W. 4. Page 604
2. A person who advises patients, and compounds and sells the medicines recommended by himself, but does not and cannot make up physicians' prescriptions, is liable to the penalties of 55 G. 3. c. 194. s. 20., for practising as an apothecary without a certificate. *The Apothecaries' Company v. Allen*, E. 3 W. 4. 625

APPEAL.

See POOR RATE, 3.

1. Notice was given of appeal against a poor rate, and the respondents attended at the sessions and prayed a respite, alleging that they had not had time to prepare their defence to the matters stated as grounds of appeal. The appellant opposed the respite; but it was granted, no notice of appeal having been proved or expressly admitted. An order of respite was made out, embodying the grounds of appeal stated in the notice:

Held, that, at the following sessions, the appellant was entitled to be heard without proving any notice of appeal. *The King v. The Justices of Hertfordshire*, H. 3 W. 4. 561

2. An order of removal "to the parish of L." was directed "to the churchwardens and overseers of the parish of L." There were

no such officers, but the parish was divided into three hamlets, *A.*, *B.*, and *C.*, each maintaining its own poor, and having separate officers. The pauper, with the order, was delivered by the officers of the removing parish to the officers of the hamlet of *A.*: Held, that a notice of appeal given in the name of the officers of the hamlet of *A.*, and reciting the order to be for removal to the hamlet of *A.*, in the parish of *L.*, could not, under these circumstances, be objected to by the respondents, and that the appeal ought to have been heard. *The King v. The Justices of Carmarthenshire*, *H. 3 W. 4.*

Page 563

3. Paupers were removed to the township of *Bingley*; the township does not maintain its own poor, but is in the parish of *Bingley*, which does: Held, that the order was informal, but the sessions might amend it. *The King v. The Inhabitants of Bingley*, *H. 3 W. 4.* 567

4. In a notice of appeal against an order for stopping up a footway (under 55 G. 3. c. 68. s. 3.), it sufficiently appears that the appellant is a party aggrieved, if it be stated that he and his tenants, occupiers of a farm and lands near the said way, and who have heretofore used, and have a right to use it, and also other persons, and the public will be put to great inconvenience.

The statute requires "ten days' notice of an appeal to the sessions against such order. By a rule of the *West Riding* sessions, in cases of appeal, "not otherwise directed by law," "ten days' notice is to be given, exclusive of the day of notice and first day of the sessions: Held, that the statute meant ten days' notice, one inclusive and the other ex-

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endo, was brought up by habeas corpus before a judge to be discharged. Immediately after his discharge, and before he had time to return home, he was again arrested on a similar writ for the same matter: Held, that he was protected from arrest redeundo. The second writ was sued out of Chancery without any return made to the first; nevertheless it was held to be regular. *The King v. Blake*, M. 3 W. 4. Page 355

2. The Court will interfere to discharge a party from arrest, or set aside the bail-bond, where it appears plainly on the face of the matter, that the arrest was groundless, but not where it would become necessary to try the merits of the case on detailed and contradictory statements in several affidavits.

It is not sufficient ground for such interference, that the defendant, denying that he is indebted, and advancing a number of facts in support of such denial, alleges his belief that the action is brought for the purpose of obtaining from him by intimidation a release of certain covenants; and states that the plaintiff, or his attorney in his presence, on being refused such release a week before the arrest, declared that some strong measure must be adopted against the defendant. *Burton v. Haworth*, H. 3 W. 4. 462

ARREST OF JUDGMENT.

See ASSUMPSIT, 3.

ASSIGNEES OF INSOLVENT DEBTOR.

See FRAUDULENT CONVEYANCE.

ASSIGNMENT.

See BANKRUPT, 5.

ASSIGNMENT OF TERM.

See ANNUITY, 2.

ASSIZES.

See JUDGMENT.

ASSUMPSIT.

See PAYMENT OF MONEY INTO COURT.

1. In assumpsit on a special contract, and for money had and received, &c., defendant pleaded the general issue, and to the common counts a tender; and he paid money into Court upon a rule in the common form, not applying in terms to any particular count: Held, that such payment could not be referred exclusively to the counts as to which a tender was pleaded, but that it applied to the whole declaration, and admitted the special contract. *Bulwer v. Horne*, M. 3 W. 4. Page 132
2. A. and others were part owners of a ship in the service of the *East India* Company. B. was managing owner, and employed C. as his agent for general purposes, and, amongst others, to receive and pay monies on account of the ship; and C. kept an account in his books with B., as such managing owner. In order to obtain payment of a sum of money due from the *East India* Company on account of the ship, it was necessary that the receipt should be signed by one or more of the owners, besides the managing owner, and upon a receipt signed by B. and one of the other owners, C. received on account of the ship 2000*l.* from the *East India* Company, and placed it to B.'s credit in his books. The part owners having brought money had
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- and received, to recover the balance of that account: Held, that C. had received the money as the agent of B., and was accountable to him for it; that there was no privity between the other part owners and C., and consequently that the action was not maintainable. *Sims and Others v. Brittain and Others*, M. 3 W. 4. Page 375
3. Declaration stated that W. P. owed the plaintiff 13*l.*, and that in consideration thereof, and that W. P., at the defendant's request, had promised defendant to work for him at certain wages, and also in consideration of W. P. leaving the amount which might be earned by him in the defendant's hands, he the defendant undertook and promised to pay the plaintiff the said sum of 13*l.* Averment, that W. P. performed his part of the agreement. Judgment arrested, because the plaintiff was a stranger to the consideration. *Price v. Easton*, H. 3 W. 4. 433
4. The solicitor to the assignees of a bankrupt received from them a sum of money, to be applied in payment of the costs of the petitioning creditor, up to the time of the choice of assignees. The solicitor offered to pay the money, on condition that the bill should undergo a subsequent taxation, but to that the petitioning creditor would not assent: Held, that the latter could not maintain money had and received thereupon against the solicitor, though, after the above offer, he had authorized the solicitor to pay over part of the money in discharge of commissioners' fees. *Baron v. Husband*, E. 3 W. 4. 611
5. A., by public advertizement, stated, that whoever would give information which should lead to the discovery of the murder of B. should, on conviction, receive a reward of 20*l.*: Held, that C., who gave such information entitled to recover the 20*l.*, she was led to inform, not proffered reward, but by motives. *Williams v. Carr*, E. 3 W. 4. Pa
6. An auctioneer, employed supposed executrix, sold of the testator; but before the real executrix received the money from the buyer: that the auctioneer could afterwards maintain an action against the buyer, though the latter had expressly promised to pay on being allowed to take away the goods, which he did. *Dickenson v. Naul*, E. 3 W. 4.
7. Where a party has employed attorneys, partners, to manage a cause for him in the Palace of Justice, and he has paid for an action in the common law against him at the suit of the attorney for the bill of costs, though only was an attorney of the cause and actually did the business of the cause: Held, that although the client gave a written retainer to the attorney only, and he only mentioned in the rule for costs, these facts were held conclusive, there being evidence aliunde, of a contract with the attorney. *J. and R. Arden, Gents., v. Tucker, Gent., One, &c.*, W. 4.

ATTACHMENT.

See PRACTICE, 6.

ATTESTATION OF BOND.

See ATTORNEY, 3.

ATTESTATION OF WILL.

See DEVISE, 2.

ATTORNEY.

ATTORNEY.

See EVIDENCE, 5. LIBEL. PRACTICE, 3. WARRANT OF ATTORNEY, 1.

1. The rule of *Trinity* term, 21 G.3., which empowers the marshal of the King's Bench to regulate the admission of persons to visit the prisoners, does not authorize him at his pleasure to prevent an attorney from visiting his client in the prison, but he must have some ground to shew for so doing, provided the attendance of such attorney is on the client's business, and necessary to or required by him. *Ex parte Matanle*, M. 3 W.4. Page 365
2. In an action against attornies for negligence, it appeared that the plaintiff employed the defendants to conduct an action for him against a surveyor of turnpike roads, for alleged trespasses. The surveyor had seized and impounded plaintiff's sheep, as having been found straying on the road: the plaintiff regained possession of them, by promising the pound keeper to pay the proper charges, and drove them home; on the same day the surveyor retook the sheep in the plaintiff's field, and again impounded them. The first and second taking were in *Surrey*, but on an intermediate day the sheep had escaped, and been impounded in *Sussex*. The turnpike act 4 G.4. c.95. s.75. only authorizes surveyors to impound sheep found on a turnpike road. The general turnpike act 3 G.4. c.126. s.147. (incorporated in the above statute by reference) requires that actions against any person for *any thing done in pursuance of the act*, shall be commenced within three months, and the venue laid

in the county where the cause of action arose.

The attornies commenced the action within three months, and had a declaration drawn by counsel, who returned it with an observation indorsed, that it would have been prudent to join two other parties. The attornies thereupon (with the plaintiff's assent) discontinued the action, and brought another after the expiration of the three months, laying the venue in *Sussex*. The declaration was settled by counsel, and the case afterwards submitted to a special pleader, who gave as his opinion, that the protecting clause of 3 G.4. c.126. did not apply to the trespass in seizing the sheep in the plaintiff's field. The plaintiff went to trial, and was nonsuited, on account of the action being out of time and the venue improper, with leave to move, which was done without success:

Held, that this was not a case of actionable negligence in the attornies.

Quære, Whether the surveyor, in making the second seizure, was within the protection of 3 G.4. c.126., as acting in pursuance of that statute, or 4 G.4. c.95.: Held, that, at all events, there was so much doubt on this point, that the attornies, if mistaken upon it, were not therefore culpably negligent. *Kemp v. Burt and Others*, H. 3 W.4. Page 425

3. An attorney's bill for business done in the county court is within the statute 2 G.2. c.23. s.23., and must be delivered to the client one month before action brought.

A charge for attesting a replevin bond is a charge relating to a suit in that court.

An attorney not having delivered any bill to his client *before* action brought, but particulars of demand, containing some taxable

items, after action brought, cannot recover for an item not taxable, if such item be in respect of business done or money paid to his client's use, in his character of attorney. *Wardle v. Nicholson*, H. 3 W. 4. Page 469

4. An attorney employed by a party about to take the benefit of the Insolvent Act, to prepare a list of debts, which were afterwards to be inserted in the schedule, omitted a debt due from the insolvent to himself, and sued for that debt after the party's discharge: Held, by Denman C. J. and Parke J., that this was not such a fraud upon the general policy of the Insolvent Act as would bar the action. Quære, whether, if he omitted to insert the debt in breach of his duty to his client, that would be a defence to an action brought by him against the latter to recover the debt, or whether it would only be the subject of a cross action? If a defence, quære whether or not it should be specially pleaded? *Howard, Gent., One, &c., v. Bartolozzi*, H. 3 W. 4.

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5. Plaintiff's attornies gave defendant's attornies their own undertaking as security for costs; the defendant obtained a verdict and died, and judgment was entered up in his name within two terms: Held, that the attorney for such deceased party, having a claim against his estate in respect of the costs, might enforce the security to satisfy such claims, without any scire facias having been sued out by the personal representatives. *Chauvel v. Chunelli*, E. 3 W. 4.

590

6. Where an attorney has received money to the use of his client, and not accounted for it, and has afterwards become bankrupt and obtained his certificate, the Court will not, on motion, order him to

repay the money so received, the amount being a debt barred by the certificate.

But if the attorney committed fraud in the receiving and counting, the Court, in the exercise of its general jurisdiction over its officer, will enforce payment, as a modification of punishment which it might wisely inflict for his misconduct.

The case of fraud, however, ought to be clear, and the attorney should have notice in the form of the rule, that the action is of a penal nature. It is not enough to call upon the attorney to shew cause why he should pay over the money. *In re Turner, Gent., One, &c., E. 3*

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7. Where a party has employed attornies, partners, to maintain a cause for him in the Palace, an action in the common law lies against him at the suit of both, for the bill of costs, though one only was an attorney. *See Court, and actually did the business there.*

Although the client gave a written retainer to the latter attorney only, and he only was mentioned in the rule for costs, these facts were held inconclusive, there being evidence aliunde, of a contract with *J. and R. Arden, Gents., &c. v. Turner, Gent., One, &c., E. 3 W. 4*

8. An agreement by an insolvent about to take the benefit of the act, with his creditor (his attorney), that the claim of the creditor should be omitted in the schedule, and that a cognovit which he shall be suspended, and released after the debtor's discharge, held by the Court of Exchequer to be fraudulent, and the cognovit and judgment signed, and execution issued thereupon after discharge, were set aside.

costs. *Tabram, Gent., One, &c. v. Freeman, E. 3 W. 4.* Page 887

AUCTION.

See FRAUDS, STATUTE OF.
STAMP.

AUCTIONEER.

See ASSUMPSIT, 6.

BAIL BOND.

See ARREST, 2. PRACTICE, 2.

BANKER.

See CHECK.

BANKRUPT.

See ASSUMPSIT, 3. INDICTMENT, 1.

1. It is a good answer to a plea of bankruptcy that the certificate was obtained by fraud, though the enactment to that effect in 5 G. 2. c. 30. s. 7. is not repeated in 6 G. 4. c. 16. *Horn v. Ion, M. 3 W. 4.* 78
2. The statute 1 W. 4. c. 7. s. 7., exempting judgments on cognovit, and by default, confession, or nil dicit, in any action commenced adversely and without collusion, from the operation of s. 108. of the bankrupt act, does not extend to judgments on warrants of attorney, though given without collusion or intention of fraudulent preference. And a sheriff having seized and sold goods on an execution issued upon such judgment, and paying over the proceeds after notice of an act of bankruptcy committed by the defendant, is answerable to the assignees for money had and received. *Crosfield and Another v. Stanley, M. 3 W. 4.* 87
3. A fieri facias was sued out on a

judgment entered up under a warrant of attorney, and the sheriff seized the goods before ten in the forenoon of the 13th of *August*, and sold the same ten days afterwards. On the 13th of *October* following, about noon, a commission issued against the defendant, under which he was declared a bankrupt: Held, first, that the seizure of the goods by the sheriff was a sufficient executing or levying, within the meaning of those words in the statute 6 G. 4. c. 16. s. 81.; secondly, that more than two calendar months had elapsed between the execution and the issuing of the commission; thirdly, that although the execution issued on a judgment entered up in pursuance of a warrant of attorney, yet, having been executed more than two months before the issuing of the commission, it was protected by s. 81., and not taken out of that section by the proviso in s. 108. Semble, that that proviso only applies to executions executed within two calendar months before the issuing of a commission. *Godson v. Sanctuary, M. 3 W. 4.* Page 255

4. The stat. 6 G. 4. c. 16. s. 127., which vests in assignees the future effects of a bankrupt who had before been bankrupt, or taken the benefit of an insolvent act, and has not paid 15s. in the pound under the subsequent commission, does not apply to a bankrupt who had obtained his certificate under such subsequent commission, before that statute passed; and, therefore, where *A.*, after being discharged under an insolvent act, had a commission of bankrupt issued against him, and obtained his certificate before the passing of the 6 G. 4. c. 16., but did not pay 15s. in the pound, and he was afterwards sued on a bond executed before his discharge under the

the insolvent act, but not inserted in his schedule, it was held, that his certificate did not bar the action. *Carew v. Edwards*, M. 3 W. 4. Page 351

5. *A.*, who resided at *Liverpool*, was in the habit of making consignments of goods to *B.*, his agent in *South America*, for sale, on the faith of and against which consignments, *A.* drew bills proportioned to their amount, to be paid by the agent out of the proceeds; and the bills were negotiated by the indorsements of *C.*, *A.*'s correspondents in *London*. Some of the bills so indorsed were refused acceptance by the agent. *C.*, on receiving information that they had been so dishonored, requested that *A.* would order his agent, in case he did not pay his, *A.*'s, drafts immediately, to hand over to *C.*'s agent such property as he had of *A.*'s of an equivalent value to the bills that should not be paid by him. *A.* agreed to do so, but became bankrupt before his order to transfer the goods reached *South America*: Held, that the bargain between *A.* and *C.* did not operate as a legal or equitable assignment of the property in *A.*'s goods, held by *B.* his agent, but that they remained the property of *A.* at the time of his bankruptcy, and passed to his assignees. *Carvalho v. Burn*, H. 3 W. 4.

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6. A tradesman undertook to do work upon an article delivered to him, for a person to whom he was indebted, and it was agreed that the work should be paid for in ready money. He afterwards became bankrupt: Held, that the act 6 G. 4. c. 16. s. 50. (which provides for the setting off of cross demands where there has been mutual credit between the bankrupt and a party claiming on his estate) did not, in this case, render

the assignees liable in tort for refusing to deliver such article to the creditor on his offering to pay off the price of the work at his own demand. *Clarke v. Others v. Fell and Another*, 3 W. 4. Page 351

7. The act 1 & 2 W. 4. c. 53. does not give validity to commissions of bankrupt found on concerted acts of bankruptcy, and, therefore, the execution of a deed, whereby a trader assigned his property to a trustee for the benefit of all his creditors, was an act of bankruptcy sufficient to support a commission found on the petition of a creditor, whether either party or privy to such act. *Marshall v. Barkworth*, H. 3 W. 4.
8. After the bankruptcy of two partners, the solvent partner, thinking the firm capable of paying its debts, continued the business and paid partnership money to the banker's to be applied in discharge of running bills of the firm paid at the bank; and it was held: Held, that this payment, having been made bona fide without any contemplation of bankruptcy by the solvent partner, was valid at law. The assignees and the solvent partner afterwards opened a fresh account at the bank, and paid in 9000l. to discharge a debt on the old account, which carried interest. The second partner became bankrupt. Held, that the assignees of the two could not recover the sum. *Woodbridge v. Swanwick*, 3 W. 4.
9. A bankrupt made a purchase of timber by two agreements, one before and one after the bankruptcy, and, after the bankruptcy, received part of the timber without paying for it, and was not entitled to receive the remainder without giving satisfaction to the assignees.

BANKRUPT.

for the whole. After the act of bankruptcy the defendant became security, and purchased from the bankrupt the benefit of the contract; which purchase was recited in the instrument by which the defendant became security. The bankrupt afterwards agreed with the defendant, that he, the bankrupt, would pay the money due to the vendor for the timber purchased by the first agreement and in part received, and should be entitled to retain the timber so purchased. The bankrupt then delivered money and bills to the defendant, to be paid to the vendor for the timber first purchased. The defendant paid the cash to his own bankers, and indorsed the bills to them; and afterwards paid the amount of the cash and of the bills to the vendor, by a single draft on those bankers. After this the commission issued.

Held, that the defendant was not liable to repay the cash to the assignees, nor to indemnify the bankrupt's estate against the bills; for the defendant was the mere agent of the vendor, and neither the cash nor the proceeds of the bills could have been recovered back from him, the transaction on his part being a bona fide one, protected by 6 G. 4. c. 16. s. 82. *Shaw and Others, Assignees of Richard Batley, v. Thomas Batley, E.* 3 W. 4. Page 801

10. A trader, conveying away property to such an extent as will prevent him from continuing his business, and render him insolvent, commits an act of bankruptcy. But those who rely upon such act of bankruptcy on a trial, must shew that it was calculated to have the alleged effect by evidence of the general state of the party's affairs at the time of such conveyance.

It is not sufficient to prove that

BILL OF EXCHANGE. 899

the trader, under pecuniary pressure, disposed of some article essential to the carrying on of his business, as that a miller, by bill of sale, transferred his waggon and horses to a creditor who had arrested him. *Wedge v. Newlyn, E.* 3 W. 4. Page 831

BANNS.

See MARRIAGE.

BASTARD.

See SETTLEMENT BY BASTARDY.

BILL OF EXCHANGE.

1. A defendant, prosecuted by parish officers for disobeying an order of maintenance, was convicted, and sentence deferred by the Court, with a view to an arrangement: in the meantime he was committed to prison, and the officers demanded of him a sum considerably exceeding the amount of maintenance due, but part of which was to cover costs. *A.* paid part, and gave a note for the remainder; he was then brought before the Court, fined 1s., and discharged. It did not appear whether or not the particulars of the arrangement were communicated to the Court, but *A.* made no complaint when brought up. In an action afterwards brought upon the note:

Held, that no irregularity appeared in the compromise, and that the note was legal. *Kirk v. Strickwood, 3 W. 4.* 421

2. "Received and borrowed of *A. B.* 30*l.*, which I promise to pay with interest, at the rate of 5*l.* per cent. I also promise to pay the demands of the sick club at *H.* in part of interest, and the remaining stock and interest to be paid on demand to the said *A. B.* Witness my hand, &c. *C. D.*"

This

This is not a promissory note.
Bolton v. Dugdale, E. 3 W. 4.

Page 619

3. In assumpsit on a bill of exchange drawn upon "*P.P.*, No. 6. *Budge Row*," and accepted by him, an averment that the bill, when due, was presented and shewn to *P.P.* for payment, is supported by proof that the holder went to 6. *Budge Row* to present it, but found the house shut up, and no one there. And notice may be given to the drawers on the day of such dishonour, as in the case of an actual refusal to pay. *Hine v. Allely, E. 3 W. 4.* 624

BILL OF MIDDLESEX.

See PRACTICE, 1.

BOARD OF CONTROL.

See MANDAMUS, 4.

BOND.

See EXECUTOR, 3.

BOOKS.

See EVIDENCE, 4.

BRIDGE.

See INDICTMENT, 3. TOLL.

BROKER.

A stock-broker is a broker within the 6 *Ann. c. 16.* and 57 *G. 3. c. 1x.*, and liable to the penalty imposed by the latter statute for acting as a broker without having been admitted by the Court of Mayor and Aldermen of London. *Clarke v. Powell, E. 3 W. 4.* 846

BUTCHER.

See MARKET.

CHECK.

BY LAW.

See MANDAMUS, 3.

CASE AND TRESPASS.

See PLEADING, 4.

CERTIFICATE.

See APOTHECARY, 1, 2.

RUPT, 1. 4. SETTLEMENT
APPRENTICESHIP, 2.

CHECK.

By the usage in the city of London, a person receiving a check on his banker's name written on it, pays it in at the banker's, the banker, if he receives it, presents it at the clearing-house, and obtains payment the same day. A debtor paid by a crossed check, the latter, on the same day, committed it to his banker. The banker negligently (as was alleged) omitted to present it to the clearing-house in time that day (when it would have been paid), and on the next it was dishonoured, the firm on which the check was drawn having stopped payment:

Held, that the supposed negligence of the banker, though it might render him liable to the customer, did not discharge the drawer; the holder of the check being entitled, by the general usage, to present it the day after he receives it; and no custom of the city being proved, as between debtor and creditor, that a check, if received by the holder, and sent by him to his banker, must be presented the same day. *Boddington v. Another v. Schlenker, E. 3*

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CLERGY

COMMITMENT.

CLERGYMAN.

See PENAL ACTION.

COLLATERAL FACT.

See EVIDENCE, 1.

COMMENCEMENT OF ACTION.

See ATTORNEY, 2. EJECTMENT, 1.

COMMITMENT.

See OVERSEER. PAWNBROKER.

The 5 G. 4. c. 18. s. 2., reciting that, by some acts penalties or sums of money are to be recovered before a justice, and he is authorised to issue his warrant for levying the same by distress, but no further remedy is provided in case no sufficient goods can be found, enacts, that whenever it shall appear to such justice that the party has not sufficient goods whereon to levy, it shall be lawful for such justice to issue forth his warrant for committing such offender to the common gaol for any term not exceeding three calendar months, unless the sum adjudged to be paid, and costs, shall be sooner paid: provided always, that the amount of such costs shall be specified in such warrant of commitment:

Held, that such warrant of commitment must be in writing; and that the detention of such party without such written warrant, cannot be justified for any longer time than is necessary for making it out. *Hutchinson v. Lowndes and Others*, M. 3 G. 4. Page 118

COMPENSATION.

See EVIDENCE, 3. MANDAMUS, 5, 6, 7.

CONVICTION. 901

COMPROMISE.

See BILL OF EXCHANGE, 1.

COMPUTATION OF TIME.

See APPEAL, 4. BANKRUPT, 3.

CONCERTED ACT OF BANKRUPTCY.

See BANKRUPT, 7.

CONDITION.

See PLEADING, 7.

CONDITION PRECEDENT

See TREASURER.

CONSIDERATION.

See ASSUMPSIT, 3.

CONSOLIDATED ACTIONS.

See PRACTICE, 8.

CONTEMPT OF COURT.

See PRACTICE, 2.

CONVICTION.

See BILL OF EXCHANGE, 1.

The stat. 15 Ric. 2. c. 2. gave justices a summary jurisdiction to convict, on their own view, for a forcible detainer after a forcible entry.

The stat. 8 Hen. 6. c. 9. recites that the stat. 15 Ric. 2. c. 2. did not extend to entries in tenements in peaceable manner, and after holden with force, and then enacts, that that statute should be duly executed, and if from henceforth any doth make any forcible entry in lands, &c. or them do hold forcibly

forcibly after complaint thereof made within the same county where such entry is made to the justices of the peace, that they should cause the statute duly to be executed :

Held, that this statute was intended to give a summary jurisdiction in cases of forcible detainer after an *unlawful* entry ; and that a conviction by justices on that statute, merely stating an entry and a forcible detainer, was insufficient. *The King v. Oakley and Others*, M. 3 W. 4. Page 307

COPYHOLD.

See DEVISE, 2. EVIDENCE, 9.

CORPORATION.

See ANNUITY, 1. MANDAMUS, 3. SETTLEMENT BY APPRENTICESHIP, 4.

1. In quo warranto for usurping the office of alderman and justice of peace of the city of *Norwich*, the plea set out a charter of *Car. 2.*, granting, among other things, that all the aldermen of the city who had borne the office of mayor, so long as they should continue in their public offices, should be justices of the peace of the same city ; that the defendant was duly elected an alderman, and still was alderman : and that he became mayor, and thereby afterwards became justice. Replication, that the defendant being such alderman and justice, was duly appointed to be treasurer of the county of the city of *N.*, and gave such security to the mayor and recorder, being justices of the peace for the said city, as in that behalf required, and accepted, and took on himself the office of treasurer, and entered on the discharge of the duty of his office,

which offices of alderman and justice, and of treasurer, were compatible with each other, &c. by the defendant vacated offices of justice and alderman &c. Rejoinder, that the defendant did not give such security. Held, on demurrer, that the rejoinder was bad, as tendering an immaterial issue :

Held, secondly, that the plea was bad, because the acceptance by a person holding a corporate office, of another incompatible office not corporate, did not operate as an absolute avoidance of the corporate office, though it might be ground for a motion ; and that acceptance of an incompatible office, did not operate as an absolute avoidance of a former office, in any case where the party could not resign himself of that office by his own act, and without the concurrence of another authority to his resignation or removal, unless such authority be privy and consent to the second appointment.

Held, also, that the defendant, as long as he was an alderman and justice of peace of the city, was not a person capable of being appointed county treasurer.

King v. John Patteson, M. 3 W. 4. Page 307

2. By charter of *Car. 2.* there was to be in the borough of *Norwich*, mayor, aldermen, and twenty capital burgesses. On the death or removal of an alderman or mayor and aldermen, or the death of any part of them, were to elect capital burgess to supply his place when a capital burgess died. The mayor, aldermen, and capital burgesses, or the greater part of them were to elect a successor from among the inhabitants and burgesses, and the mayor was to be annually elected on a certain day by the burgesses of the borough.

borough, or the greater number of them, with the consent of twenty-four freeholders and inhabitants to be chosen as directed by the charter. In practice, the mayor had always been elected by the capital burgesses only. At the election of mayor on the charter-day in 1832, there was not a majority of the number of twenty-four capital burgesses present, and no other burgesses attended.

Held, that this did not avoid the election; for that the word "*burgesses*" in the charter, (where it treated of the election of mayor,) could not be construed to mean capital burgesses: that the right of election did not devolve upon the body of capital burgesses by the mere forbearance of the other burgesses to interfere, and that the capital burgesses, in electing the mayor, acted in the capacity of burgesses merely. *The King v. Goldsmith*, *E. 3 W. 4.* Page 835

3. On motion for a quo warranto information, an affidavit stating the relator's information and belief, that the officer was elected at a court held on a certain day, and there was not at the court where he was elected as aforesaid, a proper number of electors present, is answered, if it be sworn that there was a proper number of electors at the court held on the specified day, and that the officer was not elected at that court. The officer is not bound to answer for the proceedings of any other day than that specified by the relator. *Rex v. Rolfe*, *E. 3 W. 4.* 840

COSTS.

See PRACTICE, 8.

COUNTY COURT.

See ATTORNEY, 3.

COVENANT.

See LANDLORD AND TENANT, 2.

CRIMINAL INFORMATION.

See EVIDENCE, 11.

A motion for a criminal information against a person who is not charged as a magistrate or public officer, may be made later than the second term after the alleged offence, if it be shewn that the prosecutor did not know of the fact in time to make an earlier application. *Rex v. Jollie and Another*, *E. 3 W. 4.* Page 867

CUSTOM.

See CHECK. MARKET.

DEED.

See ANNUITY, 1. BANKRUPT, 7.

R. L. granted by deed to the abbot and monks of *S.* the pasture called *Brandwood* to feed their animals, and that the grantees should have in that pasture 100 cows. By deed of the 25 *Edw. 3.*, reciting the former grant, *Henry*, Duke of *Lancaster*, the then owner of the fee, released to the abbot and monks and their successors for ever, all the right and claim which belonged to him and his heirs by any title in the pasture aforesaid, and that it might be lawful for the abbot and convent, and their successors, to inclose the said pasture, and to reduce it to cultivation, or to make any other profit thereof at their free will, without contradiction or impediment, saving to the grantor and his heirs their right to hunt. On ejectment brought to recover the lands, as part of the waste of a manor belonging to the duchy of

of *Lancaster*, the above deeds were proved, and it appeared that, as far back as living memory went, rights of ownership, inconsistent with the alleged title in respect of the duchy, had been exercised over the lands; and they had been inclosed sixteen years: Held, that the abbot and monks were to be presumed to have been in possession at the time of the second deed, and that it operated as a conveyance of the soil by way of release, though there were not words to make it operate as a feoffment with livery of seisin. *Doe dem. Dearden and Others v. Maden, E. 3 W. 4.* Page 880

DEMOLITION OF A DWELLING HOUSE.

See EVIDENCE, 3.

DEMURRER.

See PLEADING, 4.

DEVISE.

See FINE, 1.

1. Testator, after premising that should his daughter die unmarried he would not have his estate sold or frittered away after her decease, or left to any body who would not reside on it, but that it should be entailed, and residence be made the absolute groundwork of such entail; devised all his real estate to trustees and their heirs: "But to permit, nevertheless, my daughter *S. J.* not only to receive the rents and profits thereof to her own use, or to sell or mortgage any part, but also to settle on any husband, she may take the same or any part thereof for life, should he survive her, but not without his being liable to impeachment for waste, or non-residence, or neglecting necessary repairs. But

*should my daughter have a devise it to the use of such from and after my daughter's decease, with a reasonable maintenance for the education, &c. such child in the meantime. Should none of these cases happen, then devised the estate after daughter's decease to trustees to preserve contingent remainder for the use of his nephew, on condition of residence, or of security for his residence with age, if he should be a minor, the remainder vested. There were other remainders over. He said that he did not will to restrain daughter as a tenant for life, that in case of misconduct of the remainder men, she should, by the advice or consent of trustees, set aside such a devise of her will. He further added, "I recommend it to my daughter, if she want of issue to herself, to leave in legacies above 600*l.* that out of my charge of which I have also articles of sale, and entail the rest for the support of this house."*

Held, that the word "child" in this devise was *nomen collectivum*; that the daughter took an estate in tail; that the estate during her life and after her decease was of different qualities, therefore that a recovery supported by her after the testator's death was valid. *Doe dem. Jones and Others v. Davies, M. 3 W. 4.* Page 880

2. At a court baron *C.* surrendered copyhold premises to the use of *J. H.* for life, and after his decease to the use of such person and for such estate as *J. H.* should by will, attested by three witnesses, appoint; and in default of such appointment to the use of his heirs and assigns of *J. H.* forever.

J. H. was admitted on

surrender, and afterwards by will, attested by *two* witnesses only, devised the premises to *W.* and *J.*, and died without having made any other surrender or will: Held, that although the will attested by only two witnesses was not a good execution of the power given to *J. H.* by the surrender, it operated on the reversion vested in him in default of appointment, and that the want of a surrender to the use of such will was cured by the 55 G.3. c. 192. *Doe d. Hickman v. Hickman*, M. 3 W.4.

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3. Testator devised to *J. T.* his messuage or dwelling-house, and mill, with the gardens and cottage adjoining, with the mill pond, rights, and privileges thereto belonging; and also his messuage the *Ark Cottage*, garden, and lands at *Shatterwell*, in *Wincanton*, rented by Mrs. *Sly* and others; and his messuage, dwelling-house, shop, garden, and orchard at *Whitehall*, in *Wincanton* aforesaid, rented by *A. B.* and others, with their respective appurtenances. He also devised to *J. T.* his orchard by the side of the river in *W.*, near the foregoing premises, for all his (testator's) estate and interest therein, charged, nevertheless, as to the whole of the premises, with the payment of 500*l.* to his executors, in aid of and towards his residuary personal estate.

In ejectment by the devisee, to recover certain lands called *Shatterwell Close*, as part of the lands intended by the testator to pass by the above devise, it was proved by the defendant that the testator was entitled to the following premises at *Shatterwell* in *Wincanton*.

The principal messuage and two closes of land rented by Mrs. *S.*

VOL. IV.

The *Ark Cottage*, occupied by *P.*, and the garden rented by *W. L.*

The messuage, garden, and orchard called *Whitehall*, rented by *A. B.* and *C. D.*, and *Motion's Orchard*, described in the will as the little orchard, occupied by the testator himself.

These premises, with the exception of *Motion's Orchard*, were conveyed to the testator in 1828, by one conveyance, and were therein described to comprise a messuage, *Ark Cottage*, a garden, and closes by name, formerly in the occupation of, &c., but then untenanted; and also a messuage called *Whitehall*, with a garden, and orchard rented by *A. B.*

Motion's Orchard was purchased by the testator in 1827, before which time it had been united with the foregoing premises, in the possession of one person.

The testator, in 1824, purchased other premises in *Shatterwell*, and at the date of his will, and of his death, their situation was as follows: *Shatterwell Close* was rented by *W.*, with several other closes, at the rent of 170*l.* per annum. An orchard, called *Cold Bath Orchard*, was also rented by *W.*, but under a separate rent. A messuage adjoining was rented by the said *W. L.*, and *Lewis's* orchard was occupied by the testator himself. No part of the premises purchased in 1828 had ever been let with any part of the premises purchased in 1824, except the garden rented by *W. L.*; and all these latter premises were separated from the former by a lane, from which there was no entrance to *Shatterwell Close*: Held, that all these facts were admissible in evidence but that they raised no ambiguity as to the meaning of the devise of the messuage, the *Ark Cottage*,
3 N garden,

garden, and lands at Shatterwell, in Wincanton, rented by Mrs. Sly and others, that being sufficiently explicit to pass all the lands of the testator situate at Shatterwell in Wincanton, rented by any tenant. Doe d. Templeman v. Martin and Richards, E. 3 W. 4.

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4. Testator by will, dated April 1827, after devising his closes, lands, hereditaments, and real estates at *H.*, in the occupation of *J. W.*, to the use of *P. R.*, his heirs and assigns for ever, devised his messuage or tenement, closes, lands, hereditaments, and real estates situate at *Kirton*, which were then in the occupation of *J. A.*, and also the close in *Kirton* aforesaid, then in the occupation of the said *J. W.*, to the use of his great nephew *J. R.*, his heirs and assigns for ever. At the time of making this and the next mentioned will, and of the testator's death, *J. W.* occupied two closes in *Kirton*, as tenant to the testator.

In 1825 the testator had made another will, whereby he devised "the close in *K.*, occupied by *J. W.*," to certain persons, in trust for his said great nephew *J. R.*, when he should attain the age of twenty-three years. The attorney who made that will, stated he received instructions in writing from the testator, to give to *J. R.* all the lands in *Kirton*, occupied at that time by *J. W.*, but received also verbal instructions, whereby the testator described the land in the occupation of *J. W.* as a close: that the testator not being certain what land *J. W.* occupied, inquiry was made of a person supposed to know, who stated to the witness, in the presence of the testator, that it was all in one close; and that the witness, in consequence of that

information, so described in his will of 1825:

Held, that from the use of the word *closes* in other parts of the will of 1827, the word *close* in the devise of *J. R.* must be construed in its ordinary sense, not noting an inclosure, and the parol evidence shewed that the testator had two closes in *Kirton* in the occupation of *J. W.* uncertain which was intended to pass in the absence of the evidence to the former will, the devise would have been void for uncertainty.

Secondly, assuming that the evidence was admissible, (which was very doubtful,) that it should remove the ambiguity; but it was uncertain what the testator intended to pass under the devise "the close in *K.* in the occupation of *J. W.*," and consequently that the devise was at all events void for uncertainty. *Rice v. Watson, E. 3 W. 4.* Page 771

DISCHARGE.

See ARREST, 1, 2.

DISCONTINUANCE.

See FINE.

DISPENSATION.

See SETTLEMENT BY HIRE AND SERVICE.

DISTRESS.

See ACTION ON THE CASE FOR COMMITMENT. LANDLORD AND TENANT, 1.

EAST INDIA COMPANY.

See MANDAMUS, 4.

ECCLESIASTICAL BENE-
FICE.

See ANNUITY, 2. WARRANT OF
ATTORNEY, 2.

EJECTMENT.

1. A lease contained a proviso for re-entry, in case of non-repair, within three months after notice. The landlord gave notice, and before the end of the three months (which would have expired in *Hilary* vacation 1832) brought an ejectment. During the three months the cause came on for trial, and the parties agreed to an order of Court, directing that a juror should be withdrawn, and the repairs done by *Midsummer*. Default being made, the landlord brought a second ejectment, without further notice, in *Trinity* vacation, under the stat. 11 G. 4. and 1 W. 4. c. 70. s. 36.

Held, first, that the former notice had not been waived.

Secondly, that it could not be objected at nisi prius that the action had not been commenced within ten days after the right of entry accrued, pursuant to the act, this being merely matter of irregularity; and, further, that the objection was not well founded, the right of entry having been only suspended by agreement of the parties. *Doe dem. Rankin v. Brindley*, M. 3 W. 4. Page 84

2. By a local turnpike act, certain tolls were made, subject to the payment of the monies borrowed and to be borrowed thereupon. The trustees granted mortgages of such tolls in the form given by the general turnpike act, 3 G. 4. c. 126. s. 81., conveying to each creditor such proportion of the tolls, and the toll-gates, and toll-houses, as the money advanced

by him bore, or should bear, to the whole sum due, or to become due, on that security. By a subsequent act for making a new branch road, the former act was continued, and certain tolls were granted in respect of the new branch, to be applied like the former, and to be subject to the debts incurred on the credit of the former tolls, and it was enacted that all monies due on such credit should be entitled to a "preference and priority of charge and payment," before any monies advanced under this act for making the new branch.

On ejectment for the tolls and toll-houses by the holder of a mortgage (framed like the former ones) for monies lent to complete the branch road: Held, that the words "priority of charge," did not prevent this mortgagee from acquiring a legal estate in the subjects (3 G. 4. c. 126. s. 49), only remaining accountable to the other mortgagees for such portion of the tolls as they were entitled to in respect of their advances. *Doe dem. Thompson v. Lediard*, M. 3 W. 4. Page 137

3. R. L. granted by deed to the abbot and monks of S. the pasture called *Brandwood*, to feed their animals, and that the grantees should have in that pasture 100 cows. By deed of the 25 Edw. 3., reciting the former grant, *Henry*, Duke of *Lancaster*, the then owner of the fee, released to the abbot and monks and their successors, for ever, all the right and claim which belonged to him and his heirs by any title in the pasture aforesaid; and that it might be lawful for the abbot and convent, and their successors, to inclose the said pasture, and to reduce it to cultivation, or to make any other profit thereof, at their free will, without contradic-

tion or impediment, saving to the grantor and his heirs their right to hunt. On ejectment brought to recover the lands, as part of the waste of a manor belonging to the duchy of *Lancaster*, the above deeds were proved; and it appeared that, as far back as living memory went, rights of ownership, inconsistent with the alleged title in respect of the duchy, had been exercised over the lands, and they had been inclosed sixteen years: Held, that the abbot and monks were to be presumed to have been in possession at the time of the second deed, and that it operated as a conveyance of the soil by way of release, though there were not words to make it operate as a feoffment with livery of seisin. *Doe dem. Dearden and Others v. Maden, E. 3 W. 4.* Page 880

ENTRY (UNLAWFUL).

See CONVICTION, 1.

EQUITABLE ASSIGNMENT.

See BANKRUPT, 5.

EQUITABLE DEMAND.

See EXECUTOR, 3.

ESTATE TAIL.

See DEVISE, 1.

EXCEPTIVE HIRING.

See SETTLEMENT BY HIRING AND SERVICE, 2.

EVIDENCE.

See APPEAL, 1. BANKRUPT, 5. BILLS OF EXCHANGE, 3. DEVISE EXECUTOR, 2. M. 3 W. 4. PLEADING, 5.

1. If a witness on a trial gives evidence against the interest of the party calling him, such party may bring other witnesses, not to credit him generally, but to contradict him on the fact to which he has deposed, if it be material to the issue; not if it be collateral.

In an action upon a policy of insurance against fire, on which it was, whether or not goods of the plaintiff had been destroyed by fire, as alleged in the declaration. A witness was called for the plaintiff, to prove that part of the goods were supplied to the plaintiff by him before the fire. On being shewn an invoice or letter relating to such goods, he stated that they were written by him, but that he never delivered such goods to the plaintiff. He deposed, that the letter was supposed to have been sent to him (*Edinburgh*) was written by him in London, at the desire of the plaintiff; that the invoice was made up by him (the witness) after the fire, in the presence of the plaintiff's son and shopman, and the son and shopman permitted him to state that the goods had been sent according to the invoice and letter:

Held, that the son and shopman, who had already been examined for the plaintiff, might be called back to contradict these statements. *Friedlaender v. The London Assurance Co. M. 3 W. 4.* Page 881

2. On the trial of an appeal from an order of removal, the re-

ents having proved, by parol, the renting of two fields, in the appellant parish, at 15*l.* a year, and an occupation and payment of the rent for a whole year, the appellants then gave evidence that the contract for taking the two fields was reduced into writing: Held, that it lay upon the latter to produce the written contract.

The King v. The Inhabitants of Padstow, M. 3 W. 4. Page 208

3. In an action on 7 & 8 G. 4. c. 31. against the hundred of *B.*, for the felonious demolition of *Nottingham Castle* by rioters, the plaintiff produced in evidence certain orders made by the justices at the quarter sessions for the county, in which the Castle was described as being in that hundred. No proof was given that the justices who made those orders were residents in the county: Held, that the orders were admissible as evidence of reputation, for that the justices, from the nature of their office, must be presumed cognizant of the subject.

It was proved by other evidence, that for nearly two centuries the castle of *N.* had been reputed to be within the hundred of *B.*

The defendants attempted to prove that the town of *N.* had been from the earliest period separated from any jurisdiction of or connection with the adjoining hundreds, and for that purpose gave in evidence an extract from Domesday Book, in which the town was mentioned previous to the enumeration or description of the hundreds in the county, and various presentments during the reigns of *Ed. 1.*, *Ed. 3.*, and *Hen. 6.*, by the jurors of *N.* of deaths within the castle and its precincts; and they produced a charter of *Hen. 6.* whereby the town of *N.* was made a county of itself,

and the castle was specially excepted.

The Judge, after recapitulating all the evidence, told the jury that the excepting of the castle when the town was made a county, did not shew in what hundred the castle originally was; that the evidence of reputation given by the plaintiff was entitled to great weight, and that when things had gone on for two centuries in one uniform course, it was reasonable to infer that that course had prevailed from the earliest period, unless the evidence to the contrary was certain. It being objected that by this summing up too much weight was given to modern reputation, and too little to the ancient documents: Held, that the direction was proper.

Semble, that in assessing compensation for the demolition of a dwelling-house under 7 & 8 G. 4. c. 31. the jury ought to consider what sum will be necessary to repair the injury, and replace the building in the state it was when the outrage was committed; and not whether the plaintiff was likely to make it his residence, or whether it was suitable for such residence. *The Duke of Newcastle v. The Hundred of Broxtowe*, M. 3 W. 4. Page 273

4. By statute 1 & 2 G. 4. c. cxvii. incorporating a gas light company, it was enacted, that the directors should have the custody of the common seal, and power to use it for the affairs and concerns of the company, who were themselves by another clause empowered to make orders under seal at their meetings, for the government of the company, and for regulating the proceedings of the directors. No power was expressly given by the act to grant annuities. At a special general meeting of the company, a committee, previously

appointed for certain purposes, reported that it was expedient that the then clerk, whose health was bad, should be invited to retire upon a pension, on condition of abstaining from acts prejudicial to the company; that such proposal had been made to him, and that he had accepted it. The meeting voted that the report should be received and entered on the minutes, and that the directors should carry into effect the committee's recommendation. No order to this effect was made under seal. The directors, by deed in the name of the company, granted an annuity to the clerk on his retirement, subject to conditions of the nature above stated, and they put the corporate seal to it: Held, that the seal was properly affixed by the directors; that the granting of such annuity was warranted by the statute; that it was a concern of the company, within the first-mentioned clause; and that no order of the company under seal was necessary to authorize it.

The act prescribed that nothing should be done at any special general meeting, but the business for which it was called; and certain forms were required for calling it. On a special case stated, it did not appear that those forms had been gone through, and the company, who were sued on the above deed, alleged this irregularity in answer: Held, that it lay on them to give strict proof of the default; and this not being done, but a possibility appearing that the forms might have been complied with, the Court would not presume the contrary.

By the statute, the orders and proceedings entered in the company's books were to be considered as originals, and read in all courts, &c. *Quære*, Whether

this rendered them admissible evidence as between the company and a stranger? *Clarke v. Imperial Gas Light and Company*, M. 3 W. 4. Page

5. A letter written to the plaintiff's attorney before action brought by the attorney who afterwards appears in the cause for the defendant, is not evidence of an admission therein, without further proof that the defendant authorized the communication. *Staff v. Wilson*, M. 3 W. 4.
6. By the general turnpike act, 3 G. 4. c. 126. s. 134., it is enacted "that where any action shall be brought by or against any trustee of a road, evidence of the trustee having acted as such, together with the act of parliament under which he was appointed, or the order, or a copy of the order of his appointment or election, in case he was appointed or elected by the trustees, shall be sufficient proof of his being a trustee:" that the words in case he was appointed or elected by the trustees, shall be applied to cases where there is an appointment or election in fact by the trustees, in contradistinction to an appointment by the road act; and therefore of a party having acted as trustee, and of an order made by the trustees for his appointment or election was sufficient; and even under a local act, where the appointment of new trustees on death or removal, was required to be under the hands and seals of five of the old trustees, although it was shewn that no order for such appointment was so made. *Doe dem. Bagley v. Hares*, H. 3 W. 4.
7. In an action against the company for admissions by the underwriters, the admissions are not evidence, unless the company some official act is proved, or tend to charge him

And, therefore, in an action against the sheriff for taking illegal poundage, declarations of the under sheriff, after he was out of office, are not admissible to prove that the bailiff charged with having committed the extortion was the sheriff's authorized agent. *Snowball, qui tam, &c. v. Goodricke, H. 3 W. 4.* Page 541

8. Proof of a tender of 20*l.* 9*s.* 6*d.* in bank notes and silver, is sufficient to support a plea of tender of 20*l.* *Dean and Another v. James, H. 3 W. 4.* 546

9. The 48 G. 3. c. 149. s. 32., which requires that every surrender of copyhold and admittance *out of Court*, or a memorandum thereof shall be stamped; and sect. 33. which enacts, that in cases of surrender, &c. *in Court*, the steward shall make, and deliver to the tenant, a stamped copy of the Court roll, are merely revenue regulations, and not intended to vary the rules of evidence; and, therefore, a surrender and admittance out of court (presented and enrolled afterwards), may be proved by an examined copy of the Court roll, without producing the original surrender, &c. or memorandum thereof, *Doe dem. Cawthorn v. Mee, E. 3 W. 4.* 617

10. Defendant paid money into court in an action for work and labour generally, where full particulars were annexed to the record. The plaintiff proved the work mentioned in the particulars to have been performed on the property of G. by the order of M.; and gave evidence to shew that M. was authorized by the defendants, and also proved acts done by the latter, which it was contended were a recognition of his own liability for the work. The Judge left to the jury whether sufficient money had been paid; whether the defendant had ratified M.'s

order, and to what extent? The jury having found for the defendant, declared, in answer to a question from the Judge, that M. had no authority to bind the defendant. The Court, *Parke J.* dubitante, refused to disturb the verdict, it not distinctly appearing that the opinion last expressed by the jury was the ground of their verdict.

Held, per *Littledale* and *Parke Js.*, that payment into Court shews only a liability for some work and labour, and is merely evidence which may be coupled with other facts, so as to shew a partial or total liability on the particular claim, and that the effect of such payment is not altered in this respect by the rule of *Trin. 1 W. 4.*, which requires a particular demand to be annexed to the declaration. *Meager v. Smith, E. 3 W. 4.* Page 673

11. The rule established at nisi prius in prosecutions for libel in a newspaper, viz. that after production of the stamp-office affidavit, a paper corresponding with it in title, printer's and publisher's name, and place of publication, may be put in and read as published by the parties therein named, without other proof on this point, applies equally on motions for criminal information. *The King v. Donnison and Another, E. 3 W. 4.*

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12. A master in giving the character of his late servant to a person intending to take her, charged her with theft; and in support of that charge, stated, that she had borrowed money when she came into his service, and repaid it before she received any wages. In reply to an enquiry made afterwards by a relation of the servant, he admitted that the time when he paid the wages was entered in a book, which he produced, but re-

3 N 4

fused

fused to state what the time was ; and on the same party remonstrating, and observing that the servant, in consequence of her loss of character, might have gone upon the town, he answered, "What is that to us?"

Held, that this conduct was evidence to go to the jury (though slight), that the communication to the intended master was made maliciously. *Kelly v. Partington*, E. 3 W. 4. Page 700

13. In an action against *B.* and *C.* to recover the balance of a banking account which commenced in 1822, and ended on the 1st of November 1831, the right of the plaintiffs to recover depended on the rate of interest which they were entitled to charge by the understanding between the parties during their transactions together. The defendants, to prove their case on this point, proposed to call *D.*, who stated on the *voir dire*, that he was a partner with *B.* and *C.* from 1822 to the 23d of June 1831, and that the partnership accounts as between them were still unsettled. Between the witness's retirement, and November 1831, considerable sums had been paid in, and drawn out by the defendants, but the general balance had not been materially altered. Since the witness's retirement, *B.* and *C.* had asked time of their creditors to pay their debts. General releases, inter alia, of "all demands" from *B.* and *C.* to *D.*, and from *D.* to *B.* and *C.* were executed: Held, that by these releases, *D.* was rendered a competent witness. *Wilson v. Hirst*, E. 3 W. 4. 760

EXECUTOR.

See ASSUMPSIT, 6.

1. Where the residue of a term of years becomes vested in executors,

EXECUTOR.

and the yearly value is less than the reserved rent, the executors are still liable in the debt as assignees, for so much of the rent as the premises are worth.

The plaintiff having declared a covenant for rent at 26*l.*: and the defendants pleaded that they were only chargeable as executors, that the term came to the end of such, that the premises were of less yearly value than the reserved rent of 26*l.*, viz., of no value: Held, that they had fully administered &c. Replication that the premises were of the yearly value of 26*l.*: issue thereon. At the trial the yearly value was found by the jury to be 20*l.*: Held, that the replication was, in substance, that the premises were of some value: that the issue was merely in fact, and cured by verdict; and that the plaintiff might recover arrears of rent at the rate of 26*l.* by the jury. *Rubery v. and Another*, M. 3 W. 4. Page 700

2. The inventory exhibited to the Ecclesiastical Court by an executor, for the purpose of obtaining probate, is not generally prima facie evidence of his having received assets.

Semble, (per *Parke J.*) that where the inventory only deposes to effects on a farm with which the executor was acquainted, it may be prima facie evidence; but it is rebutted if it appears that the effects actually came to the executor's hands, though the executor has, with his knowledge, intermeddled with the property.

Semble, (per *Littleton J.* and *Parke Js.*) that a probate is not prima facie evidence that the executor has received the amount covered by the inventory. *Stearn v. Mills*, E. 3 W. 4.

3. S. gave a bond, conditionally, that he should pay to the

the payment of money. The obligee made *C.* his executrix, and residuary legatee, and died, not having fully administered, leaving *E.* executrix of the executrix *C.*, in trust for her (*E.*'s own benefit, a sum due on the bond in the first testator's lifetime remained unpaid. *C.*, during her lifetime, in consideration of a marriage about to take place between her and the father of *S.*, gave a bond to a trustee, conditioned for payment of a sum of money to the use of *S.*, if *C.* should survive her intended husband. She did survive him, and the money not having been paid in her lifetime, the trustee's executor sued *E.* the executor of *C.* upon that bond.

Held, that in this action the claim of *E.* upon *S.*'s bond could not be set off. *Tucker v. Tucker*, *E. 3 W. 4.* Page 745

4. Neglect to cultivate the glebe land in a husbandlike manner, is not a dilapidation for which an incumbent can recover. *Bird, Clerk, v. Relph and Another*, *E. 3 W. 4.* • 826

FIERI FACIAS.

See BANKRUPT, 3.

FINE.

Estates were settled to certain uses, with remainder to trustees for 500 years, to raise portions for younger children, remainder to the use of the first and other sons successively of the settlor in tail male, remainder to his heirs and assigns for ever. The estate came, by virtue of the settlement, to *Edward*, the settlor's eldest son, who also became the reversioner in fee. He levied a fine to his own use in fee, and devised the estates in trust for *Thomas*, his brother's son, for his life, remainder to the use of *Thomas*,

his brother's son, for life; remainders to the sons of the last mentioned *Thomas* successively, in tail male; remainder to the use of *E. C.* in fee. *Edward* died without issue in 1774. *Thomas*, the brother, suffered a recovery in the same year, devised the estates to *Thomas*, his son, for life; with remainder over, and died in 1780. *Thomas*, the son, entered on his father's death:

Held, that *Edward* being the tenant in tail, possessed of the immediate estate of freehold, was not precluded by the term of 500 years from levying a fine, which worked a discontinuance of the remainders; and that he thereupon acquired a tortious fee, which he might devise as above:

Held also that the entry of *Thomas*, the nephew of *Edward*, on the death of his father, did not remit him to the reversionary estate formerly vested in *Edward*. *Doe dem. Cooper v. Finch and Others*, *M. 3 W. 4.* Page 283

FIXTURES.

See LANDLORD AND TENANT, 3.
MANDAMUS, 7.

FORCIBLE DETAINER.

See CONVICTION, 1.

FORFEITURE.

See LANDLORD AND TENANT, 2.

FORM OF ACTION.

See PLEADING, 3.

FRANCHISE.

See MARKET.

FRAUD.

FRAUD.

See ACTION ON THE CASE.

FRAUDS, STATUTE OF.

In assumpsit by an auctioneer against a purchaser, for goods sold, an entry in the sale book by the auctioneer's clerk, who attended the sale, and, as each lot was knocked down, named the purchaser aloud, and on a sign of assent from him, made a note accordingly in the book, is a memorandum in writing by an agent lawfully authorized, within sect. 17. of the statute of frauds. For the clerk is not identified with the auctioneer (who sues), and in the business which he performs, of entering the names, &c., he is impliedly authorized by the persons attending the sale, to be their agent. *Bird v. Boulter*, H. 3 W. 4. Page 448

FRAUDULENT CONVEY-
ANCE.

The assignees of an insolvent debtor are "*parties grieved*," within the meaning of the act 13 Eliz. c. 5., against fraudulent conveyances, and may recover the penalty thereby given from the insolvent and others, parties to such conveyance.

On a fraudulent alienation of lands, the offending parties forfeit (by sect. 3. of the act) a year's value of the estate, but not the consideration money named in the conveyance. *Butcher and Another v. Harrison and Another*, M. 3 W. 4. 129

FRAUDULENT REMOVAL OF
PREGNANT WOMEN.

See SETTLEMENT BY BASTARDY.

FRIENDLY SOCIETY A

The sixth section of the Friendly Society Act, 10 G. 4. c. 56. does not apply to a society formed before the passing of the act, though it has conformed to the provisions of the act, as required by sects 39. and 40.; and therefore the tables at quarter sessions are not to enrol the rules of such a society, although it has not been made to appear that the tables of payments to be made, and benefits to be received, may be adopted for the safety to all parties concerned. *The King v. The Justices of Mersetsshire*, H. 3 W 4. Page

GAS LIGHT COMPAN

See ANNUITY, 1.

GENERAL TURNPIKE A

See EVIDENCE, 6.

GOODWILL.

See MANDAMUS, 6.

GRANTOR AND GRANTEE

See PLEADING, 7.

HIGHWAY.

See NUISANCE.

In trespass against surveyors of highways for pulling down a house, the act 13 G. 3. c. 78. does not enable them under a verdict of not guilty, to justify the pulling of it as being a nuisance to the highway. *The Commissioners of the Witham Navigation v. Padley and Others*, 3 W. 4.

INDICTMENT.

HULL DOCK COMPANY.

See TONNAGE DUTIES.

HUNDRED, ACTION AGAINST.

See EVIDENCE, 3.

HUNGERFORD MARKET COMPANY.

See MANDAMUS, 1. 6.

IMMEMORIAL USAGE.

See INDICTMENT, 3.

IMPRISONMENT.

See COMMITMENT. SETTLEMENT BY HIRING AND SERVICE, 1.

INCOMPATIBLE OFFICE.

See CORPORATION, 1.

INDENTURE.

See SETTLEMENT BY APPRENTICESHIP, 3, 4.

INDICTMENT.

See NUISANCE.

1. Indictment after stating that a commission of bankrupt had issued against A., by virtue of which the commissioners adjudged him to be a bankrupt, charged that he and the other defendants conspired to conceal a part of his personal estate: Held, that ever since the statute 6 G. 4. c. 16. s. 112., such an indictment is defective for not shewing that the party had actually become bankrupt. *The King v. Jones and Others*, M. 3 W. 4. Page 345
2. On Indictment for felony, removed by certiorari, the Court,

INSOLVENT DEBTOR. 915

under special circumstances, ordered that the defendants should be at liberty to plead by a clerk in court, and that they and the prosecutor should be restrained from bringing error on account of the pleas being so taken.

But in the same case the Court refused to allow a suggestion to be entered for the purpose of removing the trial from *Cornwall* into another county, on the alleged ground that titles to duchy property were likely to come in question, with respect to which prejudices existed in *Cornwall*, and that an impartial trial could not be had there. *The King v. Penpraze and Others*, H. 3 W. 4.

Page 573

3. A parish may indicted for non-repair of a bridge, without stating any other ground of liability than immemorial usage. *The King v. The Inhabitants of Hendon*, E. 3 W. 4. 628

INDORSEMENT OF PROCESS.

See PRACTICE, 3.

INFORMAL ISSUE.

See PLEADING, 2.

INFORMATION.

See PRACTICE, 11.

INSOLVENT ACT.

See ATTORNEY, 4. LANDLORD AND TENANT, 1. PENSION.

INSOLVENT DEBTOR.

See BANKRUPT, 4. FRAUDULENT CONVEYANCE.

1. An attorney, employed by a party about to take the benefit of the insolvent act, to prepare a list of the debts of the party,

debts which were afterwards to be inserted in the schedule, omitted a debt due from the insolvent to himself, and sued for that debt after the party's discharge: Held, by *Denman J.* and *Parke J.* that this was not such a fraud upon the general policy of the insolvent act, as would bar the action.

Quære, Whether, if he omitted to insert the debt in breach of his duty to his client, that would be a defence to an action brought by him against the latter to recover the debt, or whether it would only be the subject of a cross action? If a defence, quære whether or not it should be specially pleaded? *Howard, Gent., One, &c. v. Bartolozzi, H. 3 W. 4.* Page 555

2. An agreement by an insolvent about to take the benefit of the act, with his creditor, that the claim of the latter should be omitted in the schedule, and that a cognovit which he held shall be suspended, and revived after the debtor's discharge, was held by the Court of Exchequer to be fraudulent, and the cognovit and judgment signed, and execution issued thereupon after the discharge, were set aside with costs. *Tabram, Gent., One, &c. v. Freeman, E. 3 W. 4.* 887

INSURANCE.

See EVIDENCE, 1.

Goods and freight were insured at and from *Liverpool* to *Monte Video* and *Buenos Ayres*, if open, or the ship's final port of discharge in the *River Plate*, with liberty to wait two months at *Monte Video*, if needful, at a premium of five guineas per cent., to return 2l. per cent. for risk ending at *Monte Video* on arrival. The vessel arrived on the 2d of *August* at *Monte Video*, which was then

JUDGMENT.

blockaded by an enemy's fleet to prevent vessels passing to *Ayres*. The blockade did not cease till the 4th of *October* (the vessel afterwards sailed for *Ayres*, and was lost: Held, that the risk was at an end as soon as the vessel had staid two months at *Monte Video*, and that the underwriters were therefore discharged. *Doyle v. Powell, 5* Pa

INTERPLEADER ACT

1 & 2 W. 4. c. 58.

See PRACTICE, 5.

INVENTORY.

See EXECUTOR, 2.

IRREGULARITY.

See EJECTMENT, 1. EVIDENCE, 1.

JOINT TRESPASSEE

See TRESPASS, 2.

JUDGMENT.

See BANKRUPT, 2. WAR OF ATTORNEY, 1, 2.

By the act 11 G. 4. c. 70. s. 9. trials for felony or misdemeanour on a King's Bench record, after judgment may be pronounced at assizes, and shall have the effect of a judgment of the Court unless that Court, in the five days of the term, grant a new trial nisi for a new trial, or for reversing the judgment.

A defendant on such a record having been sentenced at assizes, cannot apply to the Court to amend the judgment by withdrawing the punishment upon a new trial nisi for a new trial, or for reversing the judgment without shewing some special

fect in the sentence, or some matter which could not have been adduced at the assizes. *The King v. Lloyd, Burnell and Others, M. 3 W. 4.* Page 135

JURYPAN.

The delivery of food to a jurypan after the jury were shut up to consider of their verdict, is no ground for setting the verdict aside, if it do not appear that such refreshment was supplied by a party to the cause, or that it was delivered to a jurypan, whose holding out decided the event.

Affidavits of jurymen are admissible as to matters which pass openly in Court, but where there is a Judge's report on the same points, that is conclusive. *Everett v. Youells, E. 3 W. 4.* 681

JUSTICES.

See ACTION ON THE CASE, 2. CONVICTION, 1. FRIENDLY SOCIETY. MANDAMUS, 5. OFFICE. OVERSEER. PAWNBROKER.

JUSTICE'S CLERK.

See OFFICE.

JUSTIFICATION.

See LIBEL. PLEADING, 1.

KING'S BENCH PRISON.

See ATTORNEY, 1.

LANDLORD AND TENANT.

See ACTION ON THE CASE, 4. EJECTMENT, 1.

1. By the insolvent act 7 G. 4. c. 57. s. 3. no distress for rent *made and levied* after the arrest of any per-

son who shall petition the court for the relief of insolvent debtors for his discharge upon the goods or effects of such person, shall be available for more than one year's rent. A distress taken before, but not sold till after the arrest of such insolvent debtor, is available for more than a year's rent. *Wray v. The Earl of Egremont, M. 3 W. 4.* Page 122

2. A private dwelling-house was demised for forty years by lease, containing a covenant to repair and keep in repair the premises, and all such buildings, improvements, and additions as should be made thereupon by the lessee during the term, with a proviso for re-entry in case of breach of covenant. The lessee changed the lower windows into shop windows, and stopped up a doorway, making a new one in a different place in the internal partition of the house: Held, that no forfeiture was incurred, the lessee's covenant being only against *non-repair*, and it being implied by the terms of the lease that additions and improvements were to be made. *Doe d. Dalton v. Jones, M. 3 W. 4.* 126
3. A tenant (not a gardener by trade) cannot remove a border of box planted on the demised premises by himself, unless by special agreement with the landlord. *Empson, Gent. v. Soden, E. 3 W. 4.* 655

LEASE.

See EJECTMENT, 1. LANDLORD AND TENANT, 2. MANDAMUS, 7.

LEGAL ESTATE.

See EJECTMENT, 2.

LIBEL.

LIBEL.

See EVIDENCE, 11.

1. The following words — "D. has had a tolerable run of luck. He keeps a well spread sideboard, but I always consider myself in a family hotel when my legs are under his table, for the bill is sure to come in sooner or later, though I rarely dabble in the mysteries of écarté or any other game. The fellow is as deep as Crockford, and as knowing as the Marquis. I do dislike this leg-al profession" — will support a declaration for libel, without explanatory averments, for they tend generally to disgrace the plaintiff.

Quære, Whether a defendant, by demurring to a declaration for a libel, admitted the libel to have been published with the intent ascribed to it in the declaration. *Digby v. Thomson*, E. 3 W. 4.

Page 821

2. In an action for a libel charging an attorney with "disgraceful conduct" in having at an election disclosed confidential communications which he had acquired professionally, the defendant pleaded in justification that the plaintiff had disclosed many details and particulars professionally and confidentially communicated to him relating to three transactions (which were specified), two of them being instances in which he had been employed by mortgagors to manage mortgages, and a third where in the course of his employment as attorney, he had become acquainted with the nature of his client's title and his right to grant leases. At the trial it appeared as to the mortgages, that the plaintiff had acted as attorney both for mortgagors and mortgagees: Held, that it was a question for the jury whether

the matters disclosed by the tiff were such the knowledge which was acquired professionally and not whether they were as he would not be compelled to disclose if called upon witness in a court of justice.

Semble that the knowledge required by the plaintiff as to the right of his client to grant hold leases, was of that private nature that he would not been bound to disclose it if on as a witness. *Moore, One, &c. v. Terrell and C* E. 3 W. 4. Page

LICENCE.

See PLEADING, 7.

LIEN.

See VENDOR AND VENDEE,

1. A. purchased premises were mortgaged to B., with proviso for re-conveyance at the and charges of the mortgage payment of principal and interest. B. sold the premises, and pay off the mortgage on the completion of the purchase; but attorney, who held the title would not deliver them to his own bill was also paid. bill contained some items chargeable on the occasion costs due from the mortgage others, which were properly able by the mortgagee: that the attorney might exercise his lien on the deeds against to the whole extent of the and that B. having been obliged to pay it for the purpose of leasing the deeds, could not recover back from the attorney amount unduly charged. *C Storey, Gent., One, &c.* E. 3

LOCOMOTIVE STEAM-
ENGINES.

See NUISANCE.

LONDON DOCK COMPANY.

See PRACTICE, 5.

MALICE.

See ACTION ON THE CASE, 2.
EVIDENCE, 12.

MANDAMUS.

See APPEAL, 4.

1. By stat. 11 G. 4. c. lxx., the *Hungerford* Market Company were empowered to purchase certain premises for the purposes of the act; and by sect. 6. it was enacted as follows: That if any person interested in such premises shall, for twenty-one days next after notice given him of their being required for the purposes of the act, refuse to treat, or not agree, for the sale thereof, in every such case the Company shall cause the value of, and recompense to be made for, such premises to be enquired of by a jury; and for summoning and returning such jury, they are empowered to issue their warrant to the High Bailiff of *Westminster*, who is required to impanel, summon, and return such jury, and is empowered to swear twelve, and to examine witnesses before them, &c.; and they shall assess the damages and recompense, &c.:

Held, that the Company, having given such notice to an occupier, could not withdraw from it, though they offered to pay all reasonable costs incurred by him in consequence; but that the act obliged them, on his demand, to issue

their warrant to the High Bailiff for summoning a jury. And the Court granted a mandamus to compel them so to do. *The King v. The Hungerford Market Company*, 3 W. 4. Page 327

2. It is discretionary in the Court either to determine the validity of a return to a mandamus on motion, or to order the case to be set down in the crown paper for argument.

The *St. Katharine* Dock Company were incorporated by act of parliament, which directed that all actions against the Company should be prosecuted against the treasurer or director for the time being; but that the body or goods, lands, &c. of such treasurer or director should not, by reason of his being defendant in such action, be liable to execution. An action having been brought by *T. C.* against the treasurer, as such, and another by the Company, in the name of the treasurer, against *T. C.*, all matters in difference were referred to an arbitrator, who awarded that *T. C.* had cause of action against the defendant, as such treasurer, for a certain sum, and directed that the treasurer should pay *T. C.* that sum on demand: and, as to the other suit, he awarded that the treasurer, as such, had no cause of action, and ordered him, as such treasurer, to pay *T. C.* the costs on demand: Held, that a mandamus would lie to the treasurer and directors, commanding them to pay the sums awarded. *The King v. The St. Katharine Dock Company*, M. 3 W. 4. 360

3. On motion for a mandamus to the master and wardens of an incorporated company of the city of *London*, to call a meeting of the company on the next annual day of election, for the purpose of electing a master and wardens according

according to the charters, it being suggested, as the ground of motion, that the said officers were at present improperly elected by a part only of the company, instead of the whole body; the Court refused the writ.

On motion afterwards for a quo warranto against the master elected in the manner complained of, it appeared that the practice, as far as it could be traced, from the year 1488, had been for the master, wardens, and a body called the court of assistants (which had varied in number from twenty-four to forty), to elect the master; and that he had usually been elected out of the court of assistants, and not out of the general body. The assistants, besides belonging to that court, had the same qualifications for being elected as the other members of the company. In some instances, but it was not stated how many or at what period, persons had been elected who were not of the court. The company had existed from time immemorial; by a charter of *Rich. 2.* they were empowered to elect a master *de seipsis* when and as they should please; and by a charter of 18 *Hen. 7.* (1502) all their liberties, franchises, and customs, were confirmed:

Held, that if one entire by-law were to be presumed, for the master, wardens &c. to elect, and to elect out of a restricted body, the latter part of such by-law would be bad, and vitiate the whole, but that no ground was laid for presuming such by-law, inasmuch as the elections from the particular body might have been made in every instance by choice, and not under any rule; and further, it appeared that there were exceptions, although these were not specifically stated; and

that even the practice of electing by a limited body was not necessarily to be presumed parol by-law, as it might have been by custom, incorporated by reference in the charter of *Hen. 7.*

Quære, Whether a quo warranto information lies at the instance of a private relator, against a person claiming to hold an office in the city of London? *The City of London v. Attwood*, 3 W. 4. Page 4.

4. The Court of Directors of the East India Company sent to the Board of Control, for their approval, a draft of a dispatch from the "Political Department," which that board altered and returned to them, to be transmitted to India, pursuant to the 38th c. 52. s. 12. The directors objected to the alterations, but to the jurisdiction of the commissioners to make them; and the alterations being insisted on by the board, the directors afterwards rescinded the resolution on which the dispatch was founded, and left it to the commissioners to originate the dispatch pursuant to the sect. 15. of the statute. Motion for a mandamus to the directors to transmit the altered dispatch:

Held, first, that the condition of the directors was equivalent to a refusal to transmit the dispatch; secondly, that the directors' refusal was not in this case annul the resolution on which the dispatch was founded; thirdly, that the dispatch having been originated by the directors, and altered by the board of control, and ordered by them to be transmitted, the proceedings being so formal, it was no answer to an application for a mandamus, that the board might by another proceeding, as by originating a new dispatch, attain the same

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fourthly, that the directors having admitted the jurisdiction of the board with respect to the dispatch, and only contested the alterations, were estopped from afterwards contending that the dispatch was not one over which the board had authority. *H. 3 W. 4.*

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5. To ground a proceeding at petty sessions under 7 & 8 G. 4. c. 31. s. 8. for compensation in respect of felonious injury by rioters, the party or his servant must go before a justice within seven days after the offence committed, and submit to examination, &c., according to section 3. of the act, as well as where an action is to be brought. And the Court will not grant a mandamus to summon such petty session, where it does not appear by affidavit that these steps have been taken, though the party swear that he has duly served the notice required by section 8. *The King v. Bateman and Another, H. 3 W. 4.* 552

6. The act 11 G. 4. c. lxx. (passed May 1830), incorporating the *Hungerford Market Company*, empowers them to purchase certain estates; and section 17. enacts, that every lessee or tenant for years or at will of any messuages, &c. to be purchased under the act, shall deliver up possession to the company at three months' notice, they making compensation to every such tenant, &c. who shall be required to quit before the expiration of his term: such compensation, in case of dispute, to be assessed by a jury. Section 19. provides, that all tenants for years, from year to year, or at will, occupiers of any messuages, &c. comprised in the act, who shall sustain "any loss, damage, or injury in respect of any interest whatsoever for good-will, improvements, tenant's fixtures, or other-

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wise, which they now enjoy, by reason of the passing of this act," shall receive compensation from the company, by such means as are provided in respect of the tenants of certain hereditaments mentioned in a schedule to the act; namely, by assessments, as before stated.

A lessee, whose term expired on the day the company came into possession (*June 24th, 1830*), obtained leave to hold on till the premises were wanted, and did so for a year and three quarters, at the end of which time he quitted, having received half a year's notice. His under-tenant, who came in at *Christmas 1828*, and had held from year to year, and who knew of the above proceedings, and also received notice to quit, was held entitled to compensation for good-will (to be assessed by a jury) under sect. 19. *The King v. The Hungerford Market Company, E. 3 W. 4.*

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7. Under sections 17. and 19. of the *Hungerford Market Act* (see the preceding case) compensation was claimed by a party, who in 1823 became the assignee of a lease for fourteen years, granted in 1818, of premises on the estate purchased by the company. The lease contained covenants to yield up the premises, with all fixtures and improvements, at the end of the term, and not to underlet or assign without leave; but this latter clause had not been introduced in contemplation of any advantage to be taken of it by the landlord with reference to the present act. The company suffered the lease to expire, and then turned out the tenant: Held, that he was entitled to have compensation assessed for the loss, if any, sustained by him in respect of good-will, or the chance of a

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beneficial

beneficial renewal of his lease; but not for fixtures set up or purchased, or for improvements made by him, inasmuch as he had no legal interest in them.

Held, nevertheless, that these might be considered by the jury in estimating the chance of a beneficial renewal. *The King v. The Hungerford Market Company (Ex parte Gosling)*, E. 3 W. 4.

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MANGANESE.

See POOR-RATE, 2.

MARKET.

Quære, if the grantee of a newly created market can, by virtue of such grant merely, maintain an action for disturbance of franchise against a person selling marketable articles in his own shop, within the franchise, but not within the limits of the market place, on the market day.

But a claim by immemorial custom to exclude others from selling such commodities on the market day, except in the market place, is valid in law.

And where a market for meat, &c. was proved to have been in existence in the reign of *James the First*, proof that the grantees of the market had for the last hundred years appointed market-lookers, that no butchers' shops had existed out of the market place until 1810, and that the shops then set up were objected to by the grantees, was held to be sufficient evidence of such immemorial right. *The Mayor of Macclesfield v. Pedley*, H. 3 W. 4.

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MARRIAGE.

To render a marriage invalid, the 4 G. 4. c. 76. s. 22. which enacts,

MARRIAGE.

"that if any persons shall ingly and wilfully intermarry out due publication of banns marriages of such persons shall be null and void," it must be contracted by *both parties* with knowledge that no due publication has taken place. And where the intended husband procured the banns to be published in a Christian and surname, and the woman had never borne that name, she did not know that fact, after the solemnization of the marriage: it was held that the marriage was valid. *The Inhabitants of Wrotham v. The Inhabitants of Wrotham*, 3 W. 4. Pa

MARSHAL OF THE KING'S BENCH.

See ATTORNEY, 1.

MASTER AND SERVANT.

See EVIDENCE, 12.

MINES.

See POOR RATE, 2.

MISJOINDER OF ACTIONS.

See PLEADING, 3.

MISJOINDER OF COUNTS.

See PLEADING, 4.

MONEY HAD AND RECEIVED.

See ASSUMPSIT, 2. 4. BANKRUPTCY.

MORTGAGOR AND MORTGAGEE.

See EJECTMENT, 2. LIEN.

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MUTUAL CREDIT.

See BANKRUPT, 6.

NEGLIGENCE.

See ATTORNEY, 2.

NOTICE OF APPEAL.

See APPEAL, 1, 2, 4.

NOTICE, SERVICE OF.

See PENAL ACTION.

NOTICE TO OVERSEERS.

See SETTLEMENT BY APPRENTICESHIP, 1.

NOTICE TO QUIT.

See MANDAMUS, 5, 6.

NOTICE TO REPAIR.

See EJECTMENT, 1.

NOTICE TO PURCHASE PREMISES.

See MANDAMUS, 1.

NOTICE OF WRIT OF ERROR.

See TRESPASS, 1.

NOTTINGHAM CASTLE.

See EVIDENCE, 3.

NUISANCE.

See HIGHWAY, 1.

By an act reciting that a railway between certain points would be of great public utility, and would materially assist the agricultural

interest and the general traffic of the country, power was given to a company to make such railway according to a plan deposited with the clerk of the peace, from which they were not to deviate more than 100 yards. By a subsequent act the company or persons authorized by them were empowered to use locomotive engines upon the railway. The railway was made parallel and adjacent to an ancient highway, and in some places came within five yards of it. It did not appear whether or not the line could have been made, in those instances, to pass at a greater distance. The locomotive engines on the railway frightened the horses of persons using the highway as a carriage road. On indictment against the company for a nuisance,

Held, that this interference with the rights of the public must be taken to have been contemplated and sanctioned by the legislature, since the words of the statute authorizing the use of the engines were unqualified; and the public benefit derived from the railway (whether it would have excused the alleged nuisance at common law or not), shewed at least that nothing was unreasonable in a clause of an act of parliament giving such unqualified authority. *The King v. Pease and Others*, M. 3 W. 4. Page 30

OCCUPATION.

See SETTLEMENT BY RENTING A TENEMENT, 2, 3.

OCCUPIER.

See POOR RATE, 1, 2.

OFFICE.

A clerk to justices in petty sessions appointed by order of such sessions, has no legal hold upon his office, nor will this Court interfere if he is dismissed summarily and without cause assigned. *Ex parte Sandys, E. 3 W. 4.* Page 863

ORDER OF REMOVAL.

See APPEAL, 3.

OUTSTANDING TERM.

See FINE.

OVERSEER.

By the statute 17 G. 2. c. 38. it is discretionary in the magistrates to commit an outgoing churchwarden or overseer who neglects or refuses to account. *The King v. The Justices of Norfolk, M. 3 W. 4.* 238

PARTICULARS OF DEMAND,

See EVIDENCE, 10.

PARTNER.

S. and E. were partners in alum works, for an indefinite period. E. was a dormant partner. In January 1829, it was agreed that the settlement of the partnership accounts, and all questions concerning the respective liabilities and the mode of winding up the affairs, and the manner and time of dissolving the partnership should be referred to an arbitrator; and it was afterwards agreed that S. and E. should respectively bid for the plant, utensils, and fixtures, and the referee was to declare the highest bidder to be the purchaser. In April 1829, S. having

been declared the highest became the purchaser, and the works were entirely given him: Held, that the partnership was then determined, although the referee had made no order for the dissolution; and that the referee had no authority, after that time, to bind E. by a promissory note. *Heath v. Sansom, M. 3 W. 4.* Pa

PARTNERSHIP.

See BANKRUPT, 8. EVIDENCE, 10. PARTNER.

PARTY GRIEVED.

See APPEAL, 4.

PAWNBROKER.

The pawnbrokers' act 40 G. 3. c. 24. enables justices, in cases where it shall be proved before them that any goods pawned have been lost, or contrary to the act, or have been embezzled or lost, or are damaged, or have been rendered of less value than at the time of being pawned, through the default, negligence, or wilful misbehaviour of the pawnbroker or person with whom the same were pawned, to award satisfaction to the owner as there specified. Held, that justices have no power in the above cases to commit in default of such satisfaction being made.

Quære, Whether a pawnbroker is answerable for pledges destroyed by accidental fire, as goods pawned within the above clause.

Semble, that the words "through the default," &c. apply to cases previously mentioned, not only to that of the goods pawned having become of less value. *Ex parte Cording*

PAYMENT.

See BANKRUPT, 8.

PAYMENT OF MONEY INTO COURT.

See ASSUMPSIT, 1. EVIDENCE, 10.

PENAL ACTION.

See APOTHECARY, 1, 2.

One calendar month before the commencement of an action for penalties against a clergyman for non-residence, a notice in writing of the intended writ and cause of action was delivered to the bishop's deputy registrar at his own house, and carried by him the next morning to the registry office, and there left: Held, that that was not sufficient to satisfy the 57 G. 3. c. 99. s. 40., which requires such notice to be delivered to the bishop of the diocese, *by leaving the same at the registry of his diocese. Vaux v. Vollans, Clerk, H. 3 W. 4.* Page 525

PENSION.

A pension during his Majesty's pleasure, granted by order in council on petition, for past services as advocate of the admiralty, and charged on the navy estimates, may be appropriated, under the insolvent act 7 G. 4. c. 57. s. 29., with the consent of the lords of the admiralty, for payment of creditors.

Quære, Whether this Court could have granted a prohibition to the insolvent debtors' court, against proceeding upon an order for such appropriation, if it had not been warranted by the statute? *Ex parte Battine, E. 3 W. 4.*

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PETTY SESSIONS.

See MANDAMUS, 5.

PINDER.

See SETTLEMENT BY SERVING AN OFFICE, 1.

PLEADING.

See ACTION ON THE CASE, 2. BILL OF EXCHANGE, 3. EVIDENCE, 8.

1. In trespass against surveyors of the highways for pulling down a watchhouse, the act 13 G. 3. c. 78. s. 82. does not enable them, under a plea not guilty, to justify the removing it as being a nuisance on the highway. *The Company of Proprietors of the Witham Navigation v. Padley and Others, M. 3 W. 4.* Page 69

2. The plaintiff having declared in covenant for rent at 26*l.* a year, the defendants pleaded that they were only chargeable as executors; that the term came to them as such; that the premises were of less yearly value than the said rent of 26*l.*, viz. of no value; and that they had fully administered, &c. Replication, that the premises were of the yearly value of 26*l.*; issue thereon. At the trial the yearly value was found by the jury to be 20*l.*: Held, that the replication was, in substance, that the premises were of some value; that the issue was merely informal and cured by verdict; and that the plaintiff might recover the arrears of rent at the rate fixed by the jury. *Rubery v. Stevens, M. 3 W. 4.* 241

3. Declaration contained six counts in case, the seventh charged that the defendants took and distrained the goods of the plaintiff for rent, of more than sufficient value to satisfy the rent and costs, and

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then

then voluntarily abandoned the same, and afterwards wrongfully, injuriously, and *veraciously* again took and distrained the same goods for the same rent, and refused to return the same, and converted them to their own use: Held, on motion in arrest of judgment for misjoinder of case and trespass, that although this second taking of goods was a trespass, yet the plaintiff might bring case for the conversion, and that the count was an informal one in case, and sufficient after verdict. *Smith v. Goodwin and Richards*, H. 3 W. 4.

Page 413

4. Declarations ("in a plea of trespass on the case") stated that the defendant, intending to injure the plaintiff in his good name, and to cause his dwelling-house to be searched for stolen goods, and to procure him to be imprisoned, went before a justice, and falsely and maliciously, and without probable cause, charged that certain specified goods of defendant had been feloniously stolen, and that he suspected that the *said* goods were concealed in the plaintiff's dwelling-house; and *upon such charge* the defendant procured the justice to grant a warrant, authorizing a constable to enter the plaintiff's house to search for the *said* goods; and the defendant, with divers other persons, caused and procured the dwelling-house of the plaintiff to be searched and rummaged for the *said* goods, and the door of such house and a pantry to be broken to pieces, and the plaintiff and his family to be disturbed in possession, and his goods to be carried away.

The general conclusion was, that by means of the premises the plaintiff was injured in his good name and trade, put to expense, and hindered in his business. A count in trover was added: Held,

on general demurrer, by 2 and *Patteson Js.*, *Little* dissentiente, that the violence alleged to have been committed in the house, and sufficiently by the declaration have been acts done in pursuance of the warrant; and in consequence of the charge made against the defendant, and that the declaration stated as mere matter of accusation, and consequently the whole count containing the conclusion was in case. *Henslow v. Fowkes*, H. 3 W. 4. P.

5. Declaration stated, that in consideration that the plaintiff sold goods to the defendant for 600*l.*, to be paid for by a bill, falling due *before* the *February* 1832, the defendant undertook to pay plaintiff the sum, by approved bills falling due *before* the said, &c. At trial the plaintiff proved a written contract, corresponding with the declaration, except that the payment was to be in a bill, falling due *by* the *February*: Held, that as the declaration did not precisely set forth any contract in this variance was amended by the Judge at Nisi Prius by the statute 9 G. 4. c. 14. *Lamey v. Bishop*, H. 3 W. 4.

6. Declaration by husband and wife stated that the wife *lived* *from the husband*, and kept a boarding-house, and enjoyed credit, and was supplied with necessaries upon credit by men, both for her own use and for carrying on her *business*; that defendant spoke words of her, and of and concerning her manner of carrying on business, imputing to her immorality, adultery, and profligacy by reason whereof divers persons left off boarding with her.

tradesmen ceased to supply her on credit, whereby she was injured in her said business and impoverished, &c.: Held, that the wife ought not to have been joined in this action, the words being only actionable in respect of damage to the business, and that damage being solely the husband's.

Whether or not he could have maintained an action under the circumstances, *quære*. *Saville and Joyce his Wife v. Sweeney*, *H. 3 W. 4.* Page 514

7. Trespass for breaking and entering the lands of the plaintiff, and sinking pits. Plea, that before the plaintiff had any thing in the said lands, one *U.* was seised in fee of one undivided third part therein, and, by indenture, granted to *B.* licence to dig, mine, &c. throughout his one third part, with liberty to erect engines, &c. for the term of twenty-one years; that before the expiration of the term the grantee died, and his executrix became legally entitled to the enjoyment of the licence, and because she could not enjoy it so fully as it was lawful for her to do without committing the supposed trespass, the defendant, as her servant, entered upon the said lands, and upon the plaintiff's possession, and committed the same.

Replication, that the supposed licence was granted, subject to a condition "that if the grantee, his executors, &c. should neglect to work the mines for a certain time, or should fail in the performance of all or any of the covenants, then and from thenceforth the indenture, and the liberties and licences thereby granted, should cease, determine, and be utterly void and of no effect." Averment that the grantee, for a space of time exceeding that specified, neglected to work the premises

contrary to the condition, and the licence thereby became utterly void:

Held, on general demurrer to the replication, that the word *void*, in the proviso, meant *voidable* at the election of the grantor, and therefore that it was necessary for the plaintiff to allege that the grantor, or some person claiming under him (which it was not shewn that the plaintiff did), had, by some act, evinced his intention to avoid the licence. *Roberts v. Davey*, *E. 3 W. 4.* Page 664

7. Declaration by husband and wife stated, that, *by agreement between the plaintiff and the defendant*, reciting that one *J. L.* had been arrested at the suit of the plaintiffs; that the defendant had become bail to the sheriff; that the bail had been forfeited; and that *J. L.* had given a cognovit for the debt and costs; it was understood and agreed *between the plaintiffs and defendant*, and the defendant undertook and promised, in consideration that the plaintiffs would not enter up judgment, or sue out execution against *J. L.* until a certain day, that he, the defendant, would render *J. L.* on that day, or in default pay the debt and costs. Averment that the plaintiff had not entered up judgment or sued out execution against *J. L.* before the day: Breach, that the defendant did not render *J. L.* on the day, or pay the debt and costs: Held, on motion in arrest of judgment, after verdict for the plaintiffs,

First, that as the agreement was stated to be with the plaintiffs, the promise must be taken after verdict to have been made to them.

Secondly, that it sufficiently appeared that the wife had a joint interest, because the cognovit by *J. L.* to *all* the plaintiffs, which

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was recited in the agreement, was a sufficient admission by the defendant of such joint interest.

Thirdly, that though the agreement by the wife was void, it might be rejected as surplusage, and that the count would then be good, as stating a promise to pay the debt and costs to the plaintiffs, in consideration that they would not enter up judgment, or sue out execution, until a given day. *Nurse v. Wills*, E. S. W. 4.

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PLEDGE.

See PAWNBROKER.

PHYSICIAN.

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But if the attorney committed fraud in the receiving and not accounting, the Court, in the exercise of its general jurisdiction over its officer, will enforce such payment, as a modification of the punishment which it might otherwise inflict for his misconduct.

The case of fraud, however, ought to be clear, and the attorney should have notice by the form of the rule, that the application is of a penal nature. It is not enough to call upon him to shew cause why he should not pay over the money. *In the Matter of Bonner, Gent., One, &c.* E. 3 W. 4. 811

11. Where a rule for a criminal information has been discharged upon the merits, the Court will not grant a rule to shew cause on a second application in the same case upon additional affidavits. *The King v. Smithson*, E. 3 W. 4.

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12. Notice to a magistrate, under 13 G. 2. c. 18. s. 5., of intention to move for a certiorari, "on the first day of next term, or so soon

after as I can be heard," is irregular if served on the first day of term, though the party does not in fact, move till after the expiration of six days. Held, *Doman C. J.*, dubitante. *In Flounders*, E. 3 W. 4. Page 8

13. A motion for a criminal information against a person who is charged as a magistrate or public officer, may be made later than the second term after the alleged offence, if it be shewn that the prosecutor did not know of the fact in time to make an early application. *Rex v. Jollie & Steel*, E. 3 W. 4. Page 8

PRESENTMENT.

See BILL OF EXCHANGE, 3. CHARGE

PRINCIPAL AND AGENT

See VENDOR AND VENDEE, 1.

PRISONER.

See PRACTICE, 3.

PROBATE.

See EXECUTOR, 2.

PROCESS.

See PRACTICE, 1. 3.

PROHIBITION.

See PENSION.

PROMISSORY NOTE.

See BILL OF EXCHANGE, 1, PARTNERSHIP, 1.

PROMOTIONS.

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REMOVAL, ORDER OF.

PURCHASE OF ESTATE.

See SETTLEMENT BY ESTATE.

PUBLIC ADVERTISEMENT.

See ASSUMPSIT, 4, 5.

QUO WARRANTO.

See MANDAMUS, 3.

RAILWAY.

See TOLL, 3.

RECOVERY.

See DEVISE, 1.

RECTOR.

See ANNUITY, 2.

**REFRESHMENT TO JURY-
MAN.**

See JURYMAN.

REGULÆ GENERALES.

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See EVIDENCE, 13.

REMITTER.

See FINE, 1.

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See APPEAL, 2, 3.

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REMOVAL OF INDICTMENT.

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See ATTORNEY, 3.

REPLICATION.

See PLEADING, 2. 7.

RETURN OF WRITS.

*See WRIT DE CONTINUANCE
CAPIENDO.*

REVERSIONER.

See ACTION ON THE CASE, 1.

REWARD.

See ASSUMPSIT, 5.

RIGHT OF ENTRY.

See EJECTMENT, 1.

ROAD.

See TOLL.

RULE OF COURT.

*See ATTORNEY, 1. PRACTICE, 3. 7.
WARRANT OF ATTORNEY, 1.*

RULE TO SHEW CAUSE.

See PRACTICE, 11.

SEAL.

See ANNUITY.

SECOND ACTION.

See PRACTICE, 8.

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ST. KATHARINE'S DOCK
COMPANY.

See MANDAMUS, 2.

SCIRE FACIAS.

See PRACTICE, 10.

SECURITY.

See TREASURER.

SEIZURE OF CHATTEL.

See TRESPASS, 2.

SENTENCE.

See JUDGMENT.

SERVANT.

See EVIDENCE, 12.

SET-OFF.

See BANKRUPT, 6. EXECUTOR, 3.

SETTLEMENT—by Apprenticeship.

1. Under the stat. 56 G. 3. c. 139. s. 2. when an apprentice is bound from one parish into another, notice must be given to the overseers of the latter, though both be in the same county and jurisdiction of the peace. *The King v. The Inhabitants of Threlkeld*, M. 3 W. 4. Page 229
2. Under the stat. 33 G. 3. c. 54. s. 24., which is in substance the same as 12 Anne, st. 1. c. 18. s. 2., an apprentice bound to a person residing in a parish under a certificate, cannot gain a settlement by such apprenticeship, though the certificate be subsequently discharged, and he afterwards continue to serve his master in the

parish for forty days. The binding, to confer a settlement, must be such as would at the time be effectual for that purpose. *The King v. The Inhabitants of Lees* M. 3 W. 4. Page 24

3. An indenture having been prepared for binding a boy apprentice the apprentice and his father being unable to write, desired a third person to write their names opposite two of the seals, and he did so. The indenture was not read to them. The apprentice immediately afterwards took the indenture to the master and left it with him; and afterwards stated, that when he did so, he considered himself bound; and he went into service under the indenture: Held that the indenture was sufficiently executed and delivered. *The King v. The Inhabitants of Longnor*, E. 3 W. 4. 64

4. By an act of parliament, all persons seized of land of the annual value of 30*l.* in the hundred of Stow, were incorporated by the name of the guardians of the poor within the hundred of Stow in the county of Suffolk, and were to have a common seal; and the poor of the hundred were to be placed under the management of the corporation; and the directors and acting guardians, whom the corporation were authorized to appoint in the manner therein mentioned, were empowered, with the consent of two justices, to bind any poor child under their management apprentice, in like manner as churchwardens and overseers of the poor, with assent of the justices of the place, were then empowered to do.

By indenture the directors and acting guardians of the poor of the hundred of Stow, with the consent of two justices, bound out a poor boy under their management an apprentice for one year

year, and affixed to the indenture the common seal of the corporation, but it was not otherwise executed by the directors and acting guardians: Held, that the indenture was invalid. *The King v. The Inhabitants of Haughley*, E. 3 W. 4. Page 650

SETTLEMENT—by Bastardy.

If a woman pregnant of a bastard be fraudulently removed by parish officers for the purpose of preventing the bastard from becoming chargeable to their parish, the child is settled in the parish from which the mother was so removed; but not if the mother be so fraudulently removed by a parishioner liable to pay rates, not being a parish officer. *The King v. The Inhabitants of Mattersey*, M. 3 W. 4. 211

SETTLEMENT—by Estate.

A surrender of an old lease by a grandfather and great uncle, and the taking of a new lease by the grandson and great nephew, at a nominal fine to the lord of a manor, is not a purchase of an estate within the statute 9 G. 1. c. 7. s. 5. *The King v. The Inhabitants of Lydlinch*, M. 3 W. 4. 150

SETTLEMENT—by Hiring and Service.

1. A female pauper, hired for a year, was during the year apprehended and fined for having committed a malicious trespass, contrary to the statute 7 & 8 G. 4. c. 30. She went to prison instead of paying the fine, by the advice of her mistress, who told her to return when her time was out; and after her imprisonment, which lasted a month, she did return to

her service, and continued in it to the end of the year, and was paid her whole year's wages: Held, that there was a dispensation with the service during the month of her imprisonment, and that she gained a settlement. *The King v. The Inhabitants of Coningsby*, M. 3 W. 4. Page 156

2. A. agreed to become the hired servant of B. for five years, to do such work as belonged to the finishing of cloth, and B. promised to pay A. 10s. a week for the first two years, 11s. for the third, 12s. for the fourth, and 13s. for the fifth, the hours of working to be from six in the morning till seven in the evening, to be paid for all overtime, and a deduction to be made for all short: Held, by Denman C. J., Parke J., Patteson Js., Taunton J. dissentiente, that this was not an exceptive hiring, but a hiring for five years absolutely. *The King v. The Inhabitants of Ossett-cum-Gawthorpe*, M. 3 W. 4. 216
3. A pauper agreed with the owners of a colliery to work constantly in the colliery from the 4th of February 1815 to the 4th of February 1816, or to forfeit and pay to his master 1s. for each and every day he should absent himself from his work, or not work a reasonable day's work to the satisfaction of his master: Held, not an exceptive hiring. *The King v. St. Helen's Auckland*, E. 3 W. 4. 718

SETTLEMENT—by Rates.

Between the passing of the 35 G. 3. c. 101., and that of 6 G. 4. c. 57., a settlement might be gained by reason of a party being charged with, and paying his share towards the public taxes or levies of the parish, in respect of a tenement above the value of 10l. *The King v. The*

v. The Inhabitants of Penryn, M.
3 G. 4. Page 224

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SETTLEMENT—by renting a
Tenement.

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1. On the trial of an appeal against an order of removal, the respondents having proved by parol the renting of two fields in the appellant parish at 15*l.* a year, and an occupation and payment of the rent for a whole year, the appellants then gave evidence that the contract for taking the two fields was reduced into writing: Held, that it lay upon the latter to produce the written contract. *The King v. The Inhabitants of Padstow, M. 3 W. 4.* 208
2. In 1827 a cottage and land were hired for a year at the rent of 11*l.* 10*s.*, and it was agreed that the land should be entered on at *Lady Day* 1827, and held till *Lady Day* 1828, and the cottage entered on at *May Day* 1827, and held till *May Day* 1828. The land and cottage were occupied for a year respectively, commencing and ending at the days agreed on, and the rent paid: Held, that that was an occupation of a tenement for one whole year, sufficient to give a settlement under the 6 G. 4. c. 57. *The King v. The Inhabitants of Ormesby, M. 3 W. 4.* 214
3. A pauper in November 1827 took a dwelling-house of *A.*, at an annual rent of 6*l.* 10*s.* In May 1828 he took of *B.* a building used as a shed, situate in the same parish, but entirely separated and distinct from the dwelling-house, at an annual rent of 5*l.* He occupied both, and duly paid the rents, until September 1830: Held, that he thereby gained a settlement, by renting a tenement under the stat. 6 G. 4. c. 57. *The King*

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STAMP.

See EVIDENCE, 9. EXECUTOR, 2.

Where several lots are knocked down to a bidder at an auction, and his name marked against them in the catalogue, a distinct contract arises for each lot; and a memorandum signed afterwards by the bidder, stating that he agrees to become the purchaser of several lots set against his name, does not require a stamp, though the aggregate exceed 20*l.* in value, no single lot being of that price. *Roots v. Lord Dormer*, M. 3 W. 4. Page 77

STOCKBROKER.

See BROKER.

SUPERSEDEAS.

See TRESPASS, 1.

SURRENDER.

See DEVISE, 2. EVIDENCE, 9.

TENDER.

See ACTION ON THE CASE, 4. ASSUMPSIT, 1. EVIDENCE, 8.

TOLL.

See POOR RATE, 4.

By an act of the 52 G. 3. entitled, "An Act for more effectually repairing the road from *Boroughbridge* in the county of *York*, to the city of *Durham*," it was in section 25. enacted, "that the respective tolls therein mentioned should, subject to the restrictions thereafter contained, be demanded and taken at every tollgate and turnpike which should

be continued or erected by virtue of that act, from the person using or attending any carriage, before any such carriage should be permitted to pass through the same."

By section 28. it was enacted, that no more tolls should be taken from any person for passing and repassing the same day, with the same horses or carriages, through any of the tollgates or turnpikes erected by virtue of that act, in the whole length of the said road from *Boroughbridge* to the city of *Durham*, nor upon the several parts thereafter specified, than as thereafter mentioned, viz. six tolls on the whole length, and on certain specified parts two tolls each.

By s. 37. it was enacted, that no toll should be demanded or taken for any carriage which could only cross the *said road*, and which should not pass more than 100 yards thereon.

By s. 68. all persons, counties, townships, &c., and bodies corporate, who by reason of tenure or otherwise, had been used to repair any part of the *said road*, should continue liable to such repairs.

Held, that the words *said road*, in the exempting clause, by reference to the title of the act, and to the nearest description of the road, which was in section 28., imported the whole space between *Boroughbridge* and the city of *Durham*, and therefore that a cart which had passed more than 100 yards along the road, including a part repairable by the county, as being at the end of a bridge, but which had gone less than 100 yards, exclusive of that part, was not exempt from toll; and that the liability of the county to repair that part did not render it unreasonable that such part should be included in the 100 yards,

then voluntarily abandoned the same, and afterwards wrongfully, injuriously, and *veraciously* again took and distrained the same goods for the same rent, and refused to return the same, and converted them to their own use: Held, on motion in arrest of judgment for misjoinder of case and trespass, that although this second taking of goods was a trespass, yet the plaintiff might bring case for the conversion, and that the count was an informal one in case, and sufficient after verdict. *Smith v. Goodwin and Richards*, H. 3 W. 4.

Page 413

4. Declarations ("in a plea of trespass on the case") stated that the defendant, intending to injure the plaintiff in his good name, and to cause his dwelling-house to be searched for stolen goods, and to procure him to be imprisoned, went before a justice, and falsely and maliciously, and without probable cause, charged that certain specified goods of defendant had been feloniously stolen, and that he suspected that the *said* goods were concealed in the plaintiff's dwelling-house; and upon such charge the defendant procured the justice to grant a warrant, authorizing a constable to enter the plaintiff's house to search for the *said* goods; and the defendant, with divers other persons, caused and procured the dwelling-house of the plaintiff to be searched and rummaged for the *said* goods, and the door of such house and a pantry to be broken to pieces, and the plaintiff and his family to be disturbed in possession, and his goods to be carried away.

The general conclusion was, that by means of the premises the plaintiff was injured in his good name and trade, put to expense, and hindered in his business. A count in trover was added: Held,

on general demurrer, by *Taw* and *Patteson* Js., *Littledale* dissentiente, that the acts of violence alleged to have been committed in the house, appeared sufficiently by the declaration to have been acts done in pursuance of the warrant; and in consequence of the charge made by the defendant, and that they were stated as mere matter of aggravation, and consequently that the whole count containing this statement was in case. *Hensworth v. Fowkes*, H. 3 W. 4. Page

5. Declaration stated, that in consideration that the plaintiff would sell goods to the defendant for 600*l.*, to be paid for by approved bills, falling due before the 15th February 1832, the defendant undertook to pay plaintiff a sum, by approved bills falling due before the said, &c. At the trial the plaintiff proved a written contract, corresponding with that set out in the declaration, except that the payment was to be in approved bills, falling due by the 15th February: Held, that although the declaration did not profess to set forth any contract in writing, this variance was amendable, and the Judge at Nisi Prius, under the statute 9 G. 4. c. 15. s. 1, was right. *Lamey v. Bishop*, H. 3 W. 4.

6. Declaration by husband and wife stated that the wife lived separate from the husband, and kept a boarding-house, and enjoyed good credit, and was supplied with necessaries upon credit by tradesmen, both for her own support and for carrying on her said business; that defendant spoke certain words of her, and of and concerning her manner of carrying on her business, imputing to her insolvency, adultery, and prostitution, by reason whereof divers persons left off boarding with her, and tradesmen refused to supply her with necessaries: Held, that the declaration was good.

tradesmen ceased to supply her on credit, whereby she was injured in her said business and impoverished, &c.: Held, that the wife ought not to have been joined in this action, the words being only actionable in respect of damage to the business, and that damage being solely the husband's.

Whether or not he could have maintained an action under the circumstances, *quære*. *Saville and Joyce his Wife v. Sweeney*, *H. 3 W. 4.* Page 514

7. Trespass for breaking and entering the lands of the plaintiff, and sinking pits. Plea, that before the plaintiff had any thing in the said lands, one *U.* was seised in fee of one undivided third part therein, and, by indenture, granted to *B.* licence to dig, mine, &c. throughout his one third part, with liberty to erect engines, &c. for the term of twenty-one years; that before the expiration of the term the grantee died, and his executrix became legally entitled to the enjoyment of the licence, and because she could not enjoy it so fully as it was lawful for her to do without committing the supposed trespass, the defendant, as her servant, entered upon the said lands, and upon the plaintiff's possession, and committed the same.

Replication, that the supposed licence was granted, subject to a condition "that if the grantee, his executors, &c. should neglect to work the mines for a certain time, or should fail in the performance of all or any of the covenants, then and from thenceforth the indenture, and the liberties and licences thereby granted, should cease, determine, and be utterly void and of no effect." Averment that the grantee, for a space of time exceeding that specified, neglected to work the premises

contrary to the condition, and the licence thereby became utterly void:

Held, on general demurrer to the replication, that the word *void*, in the proviso, meant *voidable* at the election of the grantor, and therefore that it was necessary for the plaintiff to allege that the grantor, or some person claiming under him (which it was not shewn that the plaintiff did), had, by some act, evinced his intention to avoid the licence. *Roberts v. Davey*, *E. 3 W. 4.* Page 664

7. Declaration by husband and wife stated, that, *by agreement between the plaintiff and the defendant*, reciting that one *J. L.* had been arrested at the suit of the plaintiffs; that the defendant had become bail to the sheriff; that the bail had been forfeited; and that *J. L.* had given a cognovit for the debt and costs; it was understood and agreed *between the plaintiffs and defendant*, and the defendant undertook and promised, in consideration that the plaintiffs would not enter up judgment, or sue out execution against *J. L.* until a certain day, that he, the defendant, would render *J. L.* on that day, or in default pay the debt and costs. Averment that the plaintiff had not entered up judgment or sued out execution against *J. L.* before the day: Breach, that the defendant did not render *J. L.* on the day, or pay the debt and costs: Held, on motion in arrest of judgment, after verdict for the plaintiffs,

First, that as the agreement was stated to be with the plaintiffs, the promise must be taken after verdict to have been made to them.

Secondly, that it sufficiently appeared that the wife had a joint interest, because the cognovit by *J. L.* to *all* the plaintiffs, which

was recited in the agreement, was a sufficient admission by the defendant of such joint interest.

Thirdly, that though the agreement by the wife was void, it might be rejected as surplusage, and that the count would then be good, as stating a promise to pay the debt and costs to the plaintiffs, in consideration that they would not enter up judgment, or sue out execution, until a given day. *Nurse v. Wills*, E. 3 W. 4.

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PLEDGE.

See PAWNBROKER.

PHYSICIAN.

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10. Where an attorney has received money to the use of his client, and not accounted for it, and has afterwards become bankrupt and obtained his certificate, the Court will not, on motion, order him to repay the money so received, the amount being a debt barred by the certificate.

But if the attorney committed fraud in the receiving and not accounting, the Court, in the exercise of its general jurisdiction over its officer, will enforce such payment, as a modification of the punishment which it might otherwise inflict for his misconduct.

The case of fraud, however, ought to be clear, and the attorney should have notice by the form of the rule, that the application is of a penal nature. It is not enough to call upon him to shew cause why he should not pay over the money. *In the Matter of Bonner, Gent., One, &c. E. 3 W. 4.* 811

11. Where a rule for a criminal information has been discharged upon the merits, the Court will not grant a rule to shew cause on a second application in the same case upon additional affidavits. *The King v. Smithson, E. 3 W. 4.*

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12. Notice to a magistrate, under 13 G. 2. c. 18. s. 5., of intention to move for a certiorari, "on the first day of next term, or so soon

after as I can be heard," is irregular, if served on the first day of term, though the party does in fact, move till after the expiration of six days. Held, *man C. J., dubitante. In Flounders, E. 3 W. 4.* Page

13. A motion for a criminal information against a person who is charged as a magistrate or police officer, may be made later than the second term after the offence, if it be shewn that the prosecutor did not know of the fact in time to make an earlier application. *Rex v. Jollie Steel, E. 3 W. 4.* Page

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SET-OFF.

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SETTLEMENT—by Apprenticeship.

1. Under the stat. 56 G. 3. c. 139. s. 2. when an apprentice is bound from one parish into another, notice must be given to the overseers of the latter, though both be in the same county and jurisdiction of the peace. *The King v. The Inhabitants of Threlkeld*, M. 3 W. 4. Page 229
2. Under the stat. 33 G. 3. c. 54. s. 24., which is in substance the same as 12 Anne, st. 1. c. 18. s. 2., an apprentice bound to a person residing in a parish under a certificate, cannot gain a settlement by such apprenticeship, though the certificate be subsequently discharged, and he afterwards continue to serve his master in the

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year, and affixed to the indenture the common seal of the corporation, but it was not otherwise executed by the directors and acting guardians: Held, that the indenture was invalid. *The King v. The Inhabitants of Haughley*, E. 3 W. 4. Page 650

SETTLEMENT—by Bastardy.

If a woman pregnant of a bastard be fraudulently removed by parish officers for the purpose of preventing the bastard from becoming chargeable to their parish, the child is settled in the parish from which the mother was so removed; but not if the mother be so fraudulently removed by a parishioner liable to pay rates, not being a parish officer. *The King v. The Inhabitants of Mattersey*, M. 3 W. 4. 211

SETTLEMENT—by Estate.

A surrender of an old lease by a grandfather and great uncle, and the taking of a new lease by the grandson and great nephew, at a nominal fine to the lord of a manor, is not a purchase of an estate within the statute 9 G. 1. c. 7. s. 5. *The King v. The Inhabitants of Lydlinch*, M. 3 W. 4. 150

SETTLEMENT—by Hiring and Service.

1. A female pauper, hired for a year, was during the year apprehended and fined for having committed a malicious trespass, contrary to the statute 7 & 8 G. 4. c. 30. She went to prison instead of paying the fine, by the advice of her mistress, who told her to return when her time was out; and after her imprisonment, which lasted a month, she did return to

her service, and continued in it to the end of the year, and was paid her whole year's wages: Held, that there was a dispensation with the service during the month of her imprisonment, and that she gained a settlement. *The King v. The Inhabitants of Coningsby*, M. 3 W. 4. Page 156

2. A. agreed to become the hired servant of B. for five years, to do such work as belonged to the finishing of cloth, and B. promised to pay A. 10s. a week for the first two years, 11s. for the third, 12s. for the fourth, and 13s. for the fifth, the hours of working to be from six in the morning till seven in the evening, to be paid for all overtime, and a deduction to be made for all short: Held, by Denman C. J., Parke J., Patteson Js., Taunton J. dissentiente, that this was not an exceptive hiring, but a hiring for five years absolutely. *The King v. The Inhabitants of Ossett-cum-Gawthorpe*, M. 3 W. 4. 216
3. A pauper agreed with the owners of a colliery to work constantly in the colliery from the 4th of February 1815 to the 4th of February 1816, or to forfeit and pay to his master 1s. for each and every day he should absent himself from his work, or not work a reasonable day's work to the satisfaction of his master: Held, not an exceptive hiring. *The King v. St. Helen's Auckland*, E. 3 W. 4. 718

SETTLEMENT—by Rates.

Between the passing of the 35 G. 3. c. 101., and that of 6 G. 4. c. 57., a settlement might be gained by reason of a party being charged with, and paying his share towards the public taxes or levies of the parish, in respect of a tenement above the value of 10l. *The King v. The*

v. The Inhabitants of Penryn, M.
3 G. 4. Page 224

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**SETTLEMENT—by renting a
Tenement.**

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1. On the trial of an appeal against an order of removal, the respondents having proved by parol the renting of two fields in the appellant parish at 15*l.* a year, and an occupation and payment of the rent for a whole year, the appellants then gave evidence that the contract for taking the two fields was reduced into writing: Held, that it lay upon the latter to produce the written contract. *The King v. The Inhabitants of Padstow, M. 3 W. 4.* 208

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2. In 1827 a cottage and land were hired for a year at the rent of 1*l.* 10*s.*, and it was agreed that the land should be entered on at *Lady Day* 1827, and held till *Lady Day* 1828, and the cottage entered on at *May Day* 1827, and held till *May Day* 1828. The land and cottage were occupied for a year respectively, commencing and ending at the days agreed on, and the rent paid: Held, that that was an occupation of a tenement for one whole year, sufficient to give a settlement under the 6 G. 4. c. 57. *The King v. The Inhabitants of Ormesby, M. 3 W. 4.* 214

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3. A pauper in November 1827 took a dwelling-house of *A.*, at an annual rent of 6*l.* 10*s.* In May 1828 he took of *B.* a building used as a shed, situate in the same parish, but entirely separated and distinct from the dwelling-house, at an annual rent of 5*l.* He occupied both, and duly paid the rents, until September 1830: Held, that he thereby gained a settlement, by renting a tenement under the stat. 6 G. 4. c. 57. *The King*

See BA

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STAMP.

See EVIDENCE, 9. EXECUTOR, 2.

Where several lots are knocked down to a bidder at an auction, and his name marked against them in the catalogue, a distinct contract arises for each lot; and a memorandum signed afterwards by the bidder, stating that he agrees to become the purchaser of several lots set against his name, does not require a stamp, though the aggregate exceed 20*l.* in value, no single lot being of that price. *Roots v. Lord Dormer*, M. 3 W. 4. Page 77

STOCKBROKER.

See BROKER.

SUPERSEDEAS.

See TRESPASS, 1.

SURRENDER.

See DEVISE, 2. EVIDENCE, 9.

TENDER.

See ACTION ON THE CASE, 4. ASSUMPSIT, 1. EVIDENCE, 8.

TOLL.

See POOR RATE, 4.

By an act of the 52 G. 3. entitled, "An Act for more effectually repairing the road from *Boroughbridge* in the county of *York*, to the city of *Durham*," it was in section 25. enacted, "that the respective tolls therein mentioned should, subject to the restrictions thereafter contained, be demanded and taken at every tollgate and turnpike which should

be continued or erected by virtue of that act, from the person using or attending any carriage, before any such carriage should be permitted to pass through the same."

By section 28. it was enacted, that no more tolls should be taken from any person for passing and repassing the same day, with the same horses or carriages, through any of the tollgates or turnpikes erected by virtue of that act, in the whole length of the said road from *Boroughbridge* to the city of *Durham*, nor upon the several parts thereafter specified, than as thereafter mentioned, viz. six tolls on the whole length, and on certain specified parts two tolls each.

By s. 37. it was enacted, that no toll should be demanded or taken for any carriage which could only cross the *said road*, and which should not pass more than 100 yards thereon.

By s. 68. all persons, counties, townships, &c., and bodies corporate, who by reason of tenure or otherwise, had been used to repair any part of the *said road*, should continue liable to such repairs.

Held, that the words *said road*, in the exempting clause, by reference to the title of the act, and to the nearest description of the road, which was in section 28., imported the whole space between *Boroughbridge* and the city of *Durham*, and therefore that a cart which had passed more than 100 yards along the road, including a part repairable by the county, as being at the end of a bridge, but which had gone less than 100 yards, exclusive of that part, was not exempt from toll; and that the liability of the county to repair that part did not render it unreasonable that such part should be included in the 100 yards,

yards, for passing over which toll was demandable.

And quære, whether under this act, the road trustees might not be liable, in case of default by the county, to employ the money in repairing the 300 feet at the end of a bridge? *Bussey v. Storey*, M. 3 W. 4. Page 98

2. A toll of 1d. for every pig brought into market is not necessarily unreasonable. *Wright v. Bruister*, M. 3 W. 4. 116

3. An embankment company was by act of parliament empowered to make a road, and to erect turnpikes upon or cross "any lanes or ways leading or that might thereafter lead out of the same;" and to take tolls at such turnpikes. By subsequent acts another company was empowered to make a railway, and it was enacted that all persons should have full liberty to use the same, with carriages properly constructed, upon payment only of such rates and tolls as should be demanded by the railway company, not exceeding the sums mentioned in that act. The railway was afterwards made, and it crossed the embankment company's road: Held, first, that the railway, though made and opened to the company by act of parliament, was a "way" within the meaning of the first mentioned act. Secondly, that the clause in favour of the public in the railway act, did not take away the vested right of the embankment company to their tolls; and, consequently, that they might take toll of persons crossing their road upon the railway. *Rowe v. Skilson and Another*, E. 3 W. 4. 726

TONNAGE DUTIES.

By statute 14 G. 3. c. 56. s. 42., the following tonnage duties were imposed on every ship or vessel

TONNAGE DUTIES.

(except those in the King's vice) coming into or going out of the harbour, basin, or dock at the port of *Kingston-upon-Hull* for loading or unloading of goods. 1. For every ship coming or going between the said port and any other port to the northward of the mouth, or southward of the mouth of the *Humber*, 2d. per ton. 2. For every ship coming to or going between the said port and any other place between the *North Foreland* and *Shetland*, on the east side of *England*, except as at 3d. 3. For every ship trading between the said port and any other port or place in *Great Britain* not before described, The duties to be paid on ship's entry inwards, or clearance or discharge outwards; or, if there were no entry, then to be paid at the custom house at any time before the vessel proceeded:

Held, that the first clause related only to ports on the east side of *England*, between places there named; that it related to the port of *Grimsby* though situate twenty-five miles inland from *Hull*, on the *Ouse*; and, therefore, that vessels taking all, or part of their cargo at *Goole* and going to *Hull* vice versa, were liable to the duty of 2d.: and this, though they did not enter or clear at the custom house: Held, also, that the clause did not apply to vessels loading at *Leeds* or other inland ports, situated above *Hull* and going directly thither; the third clause (if those ports were contemplated in it) did not refer to them with the precision necessary for imposing a duty, and, (*Parke J.* dubitante,) that vessels so loading at *Leeds* did not become liable to duty by merely passing through the entrance of the *Goole* docks, without tal-

TRESPASS.

in goods or making any stay there.
Hull Dock Company v. Priestly.
M. 3 W. 4. Page 178

TREASURER.

See MANDAMUS, 2.

By the statute 12 G. 2. c. 29. s. 6. it is enacted, that the respective high constables shall pay the sums of money received by them in respect of the county rate, to such person whom the justices shall at their quarter sessions appoint to be the treasurer (which treasurer they are thereby authorized to appoint), he first giving sufficient security in such sums as shall be approved by the justices at sessions, to be accountable for the money which shall be paid to him in pursuance of that act, and for which, by section 7., he is made accountable to the justices: Held, that this section of the statute does not make the giving of the security a condition precedent to a person becoming treasurer, or being responsible or accountable to the justices, but that the appointment is complete without such security being given.
The King v. Patteson, M. 3 W. 4.

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TRESPASS.

See PLEADING, 3. 7.

1. A sheriff executing a fi. fa. after notice of the allowance of a writ of error, is liable in trespass, though there has been no further supersedeas of the execution.

Notice to the sheriff of such allowance is notice to his officers, and renders them liable in trespass for proceeding with the execution.
Belshaw v. Marshall, M. 3 W. 4.

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2. A person who knowingly receives from another a chattel which the

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latter has wrongfully seized, and afterwards, on demand, refuses to give it back to the owner, does not thereby become a joint trespasser, unless the chattel was seized for his use. *Wilson v. Barker and Mitchell, E. 3 W. 4.*
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TRIAL.

See INDICTMENT, 2.

TROVER.

See BANKRUPT, 5, 6. PRACTICE, 5.
VENDOR AND VENDEE, 1.

TRUSTEE.

See EVIDENCE, 6. EXECUTOR, 3.

TURNPIKE ACT.

See ATTORNEY, 2. EJECTMENT, 2.
EVIDENCE, 6. TOLL, 1. 3.

UNDERTAKING.

See PRACTICE, 7.

UNIFORMITY OF PROCESS.

See PRACTICE, 1.

VENDOR AND VENDEE.

1. *P.* having given a general authority to *D.* to sell hay for him, *D.* advertised a sale, by the conditions of which a deposit was to be paid, and three months credit given, on approved security, for the remainder, and the lots were to be taken away within forty weeks of the sale. *D.* sold the hay to *S.*, and took his promissory note for the price. *S.* applied to *D.* for leave to cut some of the hay, and, it being granted, cut and took away part; but he was

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afterwards forbidden by *D.* to remove the residue. *D.* indorsed the note, and discounted it at his bankers, who credited him with the amount, minus the discount; it was afterwards dishonoured. *D.* having become bankrupt, it was agreed between the bankers and *S.* that the latter should sell them the residue of the hay, and that they should pay him part in money, and return him his note in satisfaction of the residue. The bankers, within forty weeks after the sale, demanded the hay of *D.*'s principal (*P.*), who refused to deliver it. In trover brought against *P.* by the bankers for the hay:

Held, first, assuming *P.* to have had a lien after the sale, and after the vendee had given his promissory note for the price of the hay, that that lien was not divested by reason of the vendee having removed part of the hay, it not appearing that this part-delivery to him was by way of delivery of the whole.

Secondly, that *P.* had no lien, because he was to be considered as having been paid for the hay by reason of his agent having taken the vendee's promissory note, and discounted it, and its being outstanding in the hands of the plaintiffs. *Burney v. Poyntz*, *H. 3 W. 4.* Page 568

VARIANCE.

See PLEADING, 5.

VENUE.

See ATTORNEY, 2.

VERDICT.

See EVIDENCE, 10. JURYMAN, PLEADING, 2.

VOID, OR VOIDABLE.

See PLEADING, 7.

WAIVER OF NOTICE.

See EJECTMENT, 1.

WARRANT OF ATTORNEY

1. A debtor being arrested, offered a warrant of attorney. The plaintiff's attorney, who had also advised the defendant in previous stages of the business, came, at his request, to the place where he was in custody, and proposed another attorney, whom he brought with him, to read over the warrant of attorney to the defendant and attest it on his behalf. The defendant acquiesced; but the attorney so introduced was not known to, or sent for, by him:

Held, that this was not a compliance with the rule *Easter 4 G.* (and see *Reg. Hil. 2 W. 4. l. 75*) which declares that no warrant of attorney executed by a person in custody of the sheriff, &c. shall be valid, unless there be present an attorney on his behalf, to be expressly named by him, and attending at his request to witness it; and the warrant of attorney and proceedings thereon were set aside for irregularity. *Walker v. Gardner and Others*, *M. 3 W. 1.* Page 3

2. A clergyman purchasing an annuity, agreed that it should be charged on his benefice, and the payment secured by a bond and warrant of attorney, with a judgment to be entered up thereon for the purpose of charging the benefice. By the deed of grant the annuity was made payable at certain days, and chargeable on the benefice, with a power of distress, &c.; it also contained a c

WARRANT OF ATTORNEY.

mise of the benefice to a trustee, with a power, in default of payment, to receive the tithes, rents, and profits, &c. It was thereby also declared, that the bond and warrant of attorney (referred to in the deed as having been already prepared, and meant to bear even date with, and to be executed and given at the same time as the deed), and the judgment to be entered up thereon, should be further securities for the annuity; and that immediately after such judgment, the creditors might sue out execution, and do such other acts as might be necessary for obtaining a sequestration; and that as often as the annuity should be in arrear, they might put in force such writ of sequestration. The condition of the bond (after reciting the agreement for purchase of the annuity, and for securing the same by such bond, warrant of attorney, and judgment, reciting also the deed of grant) was declared to be for the due payment of the annuity on certain days. The warrant of attorney gave authority to receive a declaration at the suit of the plaintiffs, in an action of debt on a bond, describing it as a bond of even date with the warrant of attorney executed by the grantor of the annuity, and given to the grantees, and to suffer judgment. The defeazance recited, that it was given to secure the payment of an annuity of the amount mentioned in the bond, payable on the same days as in the condition of the bond was expressed.

On a motion to set aside the judgment on this warrant of attorney, on the ground that it was a charge on the benefice: Held, that this did not sufficiently appear, the reference in the warrant of attorney to the bond amounting to no more than a description of

WRIT DE CONTUMACE. 939

the bond, its date, the parties to it, and the time at which the annuity was to be paid, and not incorporating the terms of the deed of grant (recited in the bond) with the warrant of attorney, so as to make the latter operate as a charge on the benefice; and this being an application to set aside a judgment for irregularity, the will was discharged with costs. *Colebrook, Baronet, v. Layton, Clerk*, H. 3 W. 4. Page 578

WARRANT OF COMMITMENT.

See COMMITMENT.

WARRANT OF DISTRESS.

See ACTION ON THE CASE, 2.

WATCH HOUSE.

See HIGHWAY.

WITNESS.

See EVIDENCE, 1. 13.

WRITTEN CONTRACT.

See EVIDENCE, 2.

WRIT OF ERROR.

Error will lie to *B. R.* on a judgment of *C. B.*, for error in fact.

A court of error will give judgment of reversal, if there be error in law apparent on the face of the record, though error in fact only be assigned. *Castledine v. Mundy*, M. 3 W. 4. 90

WRIT DE CONTUMACE CAPIENDO.

A defendant arrested on an irregular writ de contumace capiendo, was brought up by habeas corpus before a Judge to be discharged. Immediately after his discharge, and

and before he had time to return home, he was again arrested on a similar writ for the same matter: Held, that he was protected from arrest *redeundo*.

The second writ was sued out of Chancery without any return made to the first; nevertheless, it was held to be regular.

The stat. 1 W. 4. c. 3. s. 2. which enacts that all writs returnable in the King's Bench, Common Pleas, or Exchequer, on general return

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